# TRANSCRIPT OF RECORD

## SUPREME COURT OF THE UNITED STATES

No. 249.

AUGUSTUS T. HOST, PLAINTIFF IN ERROR,

vs.

THE BOARD OF SUPERVISORS OF KENDALL COUNTY.

IN ERROR TO THE CIRCUIT COURT OF THE UNITED STATES FOR THE NORTHERN DISTRICT OF ILLINOIS.

FILED SEPTEMBER 18, 1879.

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*a* Pleas in the circuit court of the United States for the northern district of Illinois, held at the United States court-rooms in the city of Chicago, in the district aforesaid, before the judges thereof, on Wednesday, the thirtieth day of July, in the July term of said court, in the year of our Lord one thousand eight hundred and seventy-nine, and of our Independence the one hundred and fourth year.

WILLIAM H. BRADLEY, *Clerk.*

AUGUSTUS T. POST
*v.*
THE BOARD OF SUPERVISORS OF KENDALL County. } Assumpsit.

1 AUGUSTUS T. POST, A RESIDENT AND citizen of the State of New York,
*vs.*
THE BOARD OF SUPERVISORS OF KENDALL County, a corporation existing by virtue of the laws of the State of Illinois. } Debt.

NORTHERN DISTRICT OF ILLINOIS, *ss:*

Be it remembered that on the 10th day of July, A. D. 1873, the plaintiff in the said-entitled cause, by his attorney, filed in the office of the clerk of said court his præcipe for a writ of summons against the Board of Supervisors of Kendall County, defendants; which said præcipe is in the words and figures following, to wit:

*Præcipe.*

UNITED STATES OF AMERICA,
*Northern District of Illinois, ss:*

Circuit court, October term, A. D. 1873.

AUGUSTUS T. POST, A RESIDENT AND CITIZEN of the State of New York,
*vs.*
THE BOARD OF SUPERVISORS OF KENDALL County, a corporation existing by virtue of the laws of the State of Illinois. } In debt, $20,000; dam., $20,000.

The clerk will issue summons in the above-entitled cause, directed to the marshal of said district, returnable to the term of said court, A. D. 1873.

Springfield, July 8, 1873.

HAY, GREENE & LITTLER,
*Plaintiff's Attorney.*

(Endorsed:) Filed July 10th, A. D. 1873. Wm. H. Bradley, clerk.

On the same day, to wit, the 10th day of July, 1873, the said plaintiff filed in the said clerk's office his bond for costs and declaration in said-entitled cause; which said bond and declaration are in the words and figures following, to wit:

*Bond for costs.*

To the circuit court of the United States for the northern district of Illinois, to the October term, A. D. 1873.

| | |
|---|---|
| AUGUSTUS T. POST<br>*vs.*<br>THE BOARD OF SUPERVISORS OF KENDALL County. | Debt, $20,000; dam., $20,000. |

Hay, Greene & Littler do hereby enter themselves security for costs in this cause, and acknowledge themselves bound to pay or cause
2 to be paid all costs which may accrue in this action, either to the opposite party or to any of the officers of this court, in pursuance of the laws of this State.

Dated this 8th day of July, A. D. 1873.

HAY, GREENE & LITTLER.

(Endorsed:) Filed July 10, 1873. Wm. H. Bradley, clerk.

*Declaration.*

To the circuit court of the United States of America for the northern district of Illinois, to the October term, A. D. 1873.

Augustus T. Post, a resident and citizen of the State of New York, plaintiff in this suit, by Hay, Greene & Littler, his attorneys, complains of the Board of Supervisors of Kendall County, Illinois, a corporation created and existing under and by virtue of the laws of the State of Illinois, a resident and citizen of said State of Illinois and the district aforesaid, the defendant in this suit, of a plea of debt:

1st. For that whereas the defendant heretofore, to wit, on the 4th day of May, A. D. 1869, at, to wit, the district aforesaid, made its certain writing obligatory, commonly called a railroad bond, sealed with the official seal of said county of Kendall and also with the private seal of the chairman of the said board of supervisors, and also attested by the signature of the clerk of said board, the date whereof is the day and year last aforesaid, and now to the court here shown, and then and there delivered the said writing obligatory to the Ottawa, Oswego and Fox River Valley Railroad Company; and which said writing obligatory is in the words and figures following, to wit:

[50-c. rev. st.]

"No. 4.] [$1,000.

*Ten per cent. bond.*

"UNITED STATES OF AMERICA,

"*State of Illinois, County of Kendall:*

"The county of Kendall, in the State of Illinois, acknowledges itself indebted in the sum of one thousand dollars, lawful money of the United States of America, which sum the said county of Kendall promise to pay to the Ottawa, Oswego and Fox River Valley Railroad Company, or to the bearer hereof, at the Fourth National Bank in the city of New York, three years from the first day of July, A. D. 1869, with interest from the first day of July, A. D. 1869, at the rate of ten per cent. per

annum, payable annually at said bank upon the presentation and delivery of the several coupons hereto annexed as they respectively become due; and to the payment of said principal and interest in the manner aforesaid the faith and revenue of said county is hereby irrevocably pledged. This bond is one of a series of fifty bonds bearing even date herewith, each for the sum of one thousand , numbered from one to fifty, inclusive, and is issued in pursuance of an election held in said county on the 30th day of March, A. D. 1869, under and by virtue of a certain act of the legislature of said State of Illinois, approved February 18th, 1857, entitled 'An act authorizing certain cities counties, incorporated towns, and townships to subscribe to the stock of certain railroads,' the said act having special reference to the said Ottawa, Oswego and Fox River Valley Railroad Company, at
3 which election a majority of the legal voters participating at the same voted 'for subscription' to the capital stock of said railroad in the sum of fifty thousand dollars and to issue the bonds of said county therefor; and the said election was by the proper authorities duly declared carried 'for subscription,' previous application in writing of fifty legal voters of said county for said election, specifying the amount to be subscribed and the conditions of such subscription, having been made to the clerk of the county court of said county, and the said clerk having called said election in accordance therewith and having given due notice of the time and place of holding the same, as required by law and the act aforesaid.

"In witness whereof the chairman of the board of supervisors of said county, by order thereof, has hereto affixed his signature officially this fourth day of May, A. D. 1869.

"DAVID H. SHONTS, [SEAL.]
"*Chairman of Board of Supervisors, Kendall Co.*

(Written across the face in red ink:) "One thousand dollars.

"All of which is attested by the clerk of the county court of said county and ex-officio clerk of said board of supervisors, under his hand and the seal of said court, at Yorkville, the 4th day of May, A. D. 1869.

[SEAL KENDALL COUNTY COURT.] "JEREMIAH EVARTS,
"*Clerk.*"

And the said Ottawa, Oswego and Fox River Valley Railroad Company afterwards, to wit, on the day and year last aforesaid, at, to wit, the State of New York aforesaid, for value received, sold and transferred the said writing obligatory to the plaintiff, whereby the plaintiff then and there became the bearer & owner thereof; of all which the said defendant then and there had due notice, to wit, at the district aforesaid; whereby an action hath accrued to the plaintiff to demand and have of and from the defendant said sum of one thousand dollars in the said writing obligatory mentioned, according to the tenor and effect thereof and of the sale and transfer aforesaid.

2. And for that whereas, also, the defendant, afterwards, to wit, on the day and year last aforesaid, at, to wit, the district aforesaid, made its certain other writing obligatory, commonly called a railroad bond, sealed with the official seal of said county of Kendall and also with the private seal of the chairman of the said board of supervisors, and also attested by the signature of the clerk of said board, the date whereof is the date and year last aforesaid, and now to the court here shown,

and then and there delivered the said last-mentioned writing obligatory to the Ottawa, Oswego and Fox River Valley Railroad Company, and which said writing obligatory last mentioned is in the words and figures following, to wit:

[Stamp.]

"No. 5. $1,000.

"*Ten per cent. bond.*

"UNITED STATES OF AMERICA,
"*State of Illinois, Kendall County:*

"The county of Kendall, in the State of Illinois, acknowledges itself indebted in the sum of one thousand dollars, lawful money of the United States of America, which sum the said county of Kendall promise to pay to the Ottawa, Oswego and Fox River Valley Railroad Company, or to the bearer hereof, at the Fourth National Bank in the city of New York, three years from the first day of July, A. D. 1869, with interest from the first day of July, A. D. 1869, at the rate of ten per cent. per annum, payable annually at said bank upon the presentation and delivery of the several coupons hereto annexed as they respectively become due; and to the payment of said principal and interest in the manner aforesaid the faith and revenue of said county is hereby irrevocably pledged. This bond is one of a series of fifty bonds bearing even date herewith, each for the sum of one thousand dollars, numbered from one to fifty, inclusive, and is issued in pursuance of an election held in said county on the 30th day of March, A. D. 1869, under and by virtue of a certain act of the legislature of said State of Illinois, approved February 18th, 1857, entitled 'An act authorizing certain cities, counties, incorporated towns, and townships to subscribe to the stock of certain railroads,' the said act having special reference to the said Ottawa, Oswego and Fox River Valley Railroad Company, at which election a majority of the legal voters participating at the same voted 'for subscription' to the capital stock of said railroad in the sum of fifty thousand dollars and to issue the bonds of said county therefor; and the said election was by the proper authorities duly declared carried 'for subscription,' previous application, in writing, of fifty legal voters of said county for said election, specifying the amount to be subscribed and the conditions of such subscription, having been made to the clerk of the county court of said county, and the said clerk having called said election in accordance therewith and having given due notice of the time and place of holding the same, as required by law and the act aforesaid.

"In witness whereof the chairman of the board of supervisors of said county, by order thereof, has hereto affixed his signature officially this fourth day of May, A. D. 1869.

"DAVID H. SHONTS, [SEAL.]
"*Chairman of Board of Supervisors of Kendall Co.*

(Written across the face in red ink:) "One thousand dollars.

"All of which is attested by the clerk of the county court of said county and ex-officio clerk of said board of supervisors, under his hand and the seal of said court, at Yorkville, this 4th day of May, A. D. 1869.

[SEAL COUNTY COURT.] "JEREMIAH EVARTS, *Clerk.*"

And the said Ottawa, Oswego and Fox River Valley Railroad Company afterwards, to wit, on the day and year last aforesaid, at, to wit, the State of New York aforesaid, for value received, sold and transferred the said last writing obligatory to the plaintiff, whereby said plaintiff then and there became the bearer & owner thereof, of all of which said defendant then had notice, to wit, at the district aforesaid; whereby an action hath accrued to the plaintiff to demand and have of and from the defendant said sum of one thousand dollars in said last writing obligatory mentioned, according to the tenor and effect thereof and of the sale and transfer aforesaid.

3. And for that whereas, also, the said defendant afterwards, to wit, on the 4th day of May, A. D. 1869, at, to wit, the district aforesaid, made its certain other writing obligatory, commonly called a railroad bond, sealed with the official seal of the county of Kendall aforesaid, and with the private seal of the chairman of the said board of supervisors, and also attested by the signature of the clerk of said board of supervisors, and now to the court here shown, the date whereof is the day and year aforesaid, and then and there delivered said writing obligatory to the Ottawa, Oswego and Fox River Valley Railroad Company; and which said writing obligatory is in the words and figures following, to wit:

[50-c. rev. stamp.]

"No. 8.] [$1,000.

"*Ten per cent. bond.*

"UNITED STATES OF AMERICA,
"*State of Illinois, County of Kendall:*

"The county of Kendall, in the State of Illinois, acknowledges itself indebted in the sum of one thousand dollars, lawful money of the United States of America, which sum the said county of Kendall promise to pay to the Ottawa, Oswego & Fox River Valley Railroad Company, or to the bearer hereof, at the Fourth National Bank in the city of New York, three years from the first day of July, A. D. 1869, with interest from the first day of July, A. D. 1869, at the rate of ten per cent. per annum, payable annually at said bank upon the presentation and delivery of the several coupons hereto annexed as they respectively become due; and to the payment of said principal and interest in the manner aforesaid the faith and revenue of said county is hereby irrevocably pledged.

"This bond is one of a series of fifty bonds, bearing even date herewith, each for the sum of one thousand dollars, numbered from one to fifty, inclusive, and is issued in pursuance of an election held in said county, on the 30th day of March, A. D. 1869, under and by virtue of a certain act of the legislature of said State of Illinois, approved February 18th, 1857, entitled 'An act authorizing certain cities, counties, incorporated towns, and townships to subscribe to the stock of certain railroads,' the said act having special reference to the said Ottawa, Oswego & Fox River Valley Railroad Company, at which election a majority of the legal voters participating at the same voted 'for subscription' to the capital stock of said railroad in the sum of fifty thousand dollars, and to issue the bonds of said county therefor; and the said election was by the proper authorities duly declared carried 'for subscription,' previous application in writing of fifty legal voters of said county for said election, specifying the amount to be subscribed and the conditions of said subscription, having been made to the clerk of the

county court of said county, and the said clerk having called said election in accordance therewith, and having given due notice of the time and place of holding the same, as required by law and the act aforesaid.

"In witness whereof the chairman of the board of supervisors of said county, by order thereof, has hereto affixed his signature officially this fourth day of May, A. D. 1869.

"DAVID. H. SHONTS, [SEAL.]
"*Chairman of Board of Supervisors of Kendall Co.*

(Written across the face in red ink:) "One thousand dollars.

"All of which is attested by the clerk of the county court of said county and ex-officio clerk of said board of supervisors, under his hand and the seal of said court, at Yorkville, this 4th day of May, A. D. 1869.

[SEAL OF KENDALL COUNTY.] "JEREMIAH EVARTS,
"*Clerk.*"

6 And the said Ottawa, Oswego and Fox River Valley Railroad Company afterwards, to wit, on the day and year last aforesaid, at, to wit, the State of New York aforesaid, for value received, sold and transferred said last-mentioned writing obligatory to the plaintiff, whereby said plaintiff then and there became the bearer and owner thereof; of all of which the defendant then and there had due notice, to wit, at the district aforesaid; whereby an action hath accrued to the plaintiff to demand and have of and from the said defendant the said sum of one thousand dollars in said last writing obligatory mentioned, according to the tenor and effect thereof and of the sale and transfer thereof as aforesaid.

4. And for that whereas, also, the defendant afterwards, to wit, on the 4th day of May, A. D. 1873, at, to wit, the district aforesaid, made its certain other writing obligatory, commonly called a railroad bond, sealed with the official seal of said county of Kendall and with the private seal of the chairman of said board of supervisors, and also attested by the clerk of said board, and now to the court here shown, the date whereof is the day and year last aforesaid, and then and there delivered the same to the Ottawa, Oswego and Fox River Valley Railroad Company; and which said writing obligatory last mentioned is in the words and figures following, to wit:

[50 c't rev. stamp.]

"No. 9.] [$1,000.

"*Ten per cent. bond.*

"UNITED STATES OF AMERICA,
"*State of Illinois, County of Kendall:*

"The county of Kendall, in the State of Illinois, acknowledges itself indebted in the sum of one thousand dollars, lawful money of the United States of America, which sum the said county of Kendall promise to pay to the Ottawa, Oswego and Fox River Valley Railroad Company, or to the bearer hereof, at the Fourth National Bank in the city of New York, three years from the first day of July, A. D. 1869, with interest from the first day of July, A. D. 1869, at the rate of ten per cent. per annum, payable annually at said bank upon the presentation and delivery of the several coupons hereto annexed as they respect-

ively become due; and to the payment of said principal and interest in the manner aforesaid the faith and revenue of said county is hereby irrevocably pledged. This bond is one of a series of fifty bonds, bearing even date herewith, each for the sum of one thousand dollars, numbered from one to fifty, inclusive, and is issued in pursuance of an election held in said county on the 30th day of March, A. D. 1869, under and by virtue of a certain act of the legislature of said State of Illinois, approved February 18th, 1857, entitled 'An act authorizing certain cities, counties, incorporated towns, and townships to subscribe to the stock of certain railroads,' the said act having special reference to the said Ottawa, Oswego and Fox River Valley Railroad Company, at which election a majority of the legal voters participating at the same voted 'for subscription' to the capital stock of said railroad in the sum of fifty thousand dollars, and to issue the bonds of said county therefor; and the said election was by the proper authorities duly declared carried 'for subscription,' previous application, in writing, of fifty legal voters of said county for said election, specifying the amount to be subscribed and the conditions of such subscription, having been made to the
7 clerk of the county court of said county, and the said clerk having called said election in accordance therewith, and having given due notice of the time and place of holding the same, as required by law and the act aforesaid.

"In witness whereof the chairman of the board of supervisors of said county, by order thereof, has hereto affixed his signature officially, this fourth day of May, A. D. 1869.

"DAVID H. SHONTS, [SEAL.]
"*Chairman of Board of Supervisors of Kendall Co.*

(Written across the face in red ink:) "One thousand dollars.

"All of which is attested by the clerk of the county court of said county and ex-officio clerk of said board of supervisors, under his hand and the seal of said court, at Yorkville, this 4th day of May, A. D. 1869.

{ SEAL COUNTY COURT, KENDALL CO. } "JEREMIAH EVARTS, *Clerk.*"

And the said Ottawa, Oswego and Fox River Valley Railroad Company afterwards, to wit, on day and year last aforesaid, at, to wit, the State of New York aforesaid, for value received, sold and transferred the said last-mentioned writing obligatory to the plaintiff, whereby the said plaintiff then and there became the bearer and owner thereof; of all of which the said defendant then and there had due notice, to wit, at the district aforesaid; whereby an action hath accrued to the plaintiff to demand and have of and from the said defendant said sum of one thousand dollars in said last writing obligatory mentioned, according to the tenor and effect thereof and of the sale and transfer as aforesaid.

5. For that whereas, also, the said defendant afterwards, to wit, on the 4th day of May, A. D. 1869, at, to wit, the district aforesaid, made its certain other writing obligatory, commonly called a railroad bond, sealed with the official seal of said county of Kendall and with the private seal of the chairman of the said board of supervisors, also attested by the signature of the clerk of said board, the date whereof is the day and year last aforesaid, and now to the court here shown, and then and there delivered said last-mentioned writing obligatory to the Ottawa, Oswego & Fox River Valley Railroad Company; and which

said last-mentioned writing obligatory is in the words and figures following, to wit:

[50-c. rev. stamp.]

"No. 10.] [$1,000.

"*Ten per cent, bond.*

"UNITED STATES OF AMERICA,

"*State of Illinois, County of Kendall:*

"The county of Kendall, in the State of Illinois, acknowledges itself indebted in the sum of one thousand dollars, lawful money of the United States of America, which sum the said county of Kendall promise to pay to the Ottawa, Oswego & Fox River Valley Railroad Company, or to the bearer hereof, at the Fourth National Bank, in the city of New York, three years from the first day of July, A. D. 1869, with interest from the first day of July, A. D. 1869, at the rate of ten per cent. per annum, payable annually at said bank upon the
8 presentation and delivery of the several coupons hereto annexed as they respectively become due; and to the payment of said principal and interest in the manner aforesaid the faith and revenue of said county is hereby irrevocably pledged. This bond is one of a series of fifty bonds bearing even date herewith, each for the sum of one thousand dollars, numbered from one to fifty inclusive, and is issued in pursuance of an election held in said county on the 30th day of March, A. D. 1869, under and by virtue of a certain act of the legislature of said State of Illinois, approved February 18th, 1857, entitled 'An act authorizing cities, counties, incorporated towns, and townships to subscribe to the stock of certain railroads,' the said act having special reference to the said Ottawa, Oswego and Fox River Valley Railroad Company, at which election a majority of the legal voters participating at the same time voted 'for subscription' to the capital stock of said railroad in the sum of fifty thousand dollars, and to issue the bonds of said county therefor; and the said election was by the proper authorities duly declared carried 'for subscription,' previous application, in writing, of fifty legal voters of said county for said election, specifying the amount to be subscribed and the conditions of such subscription, having been made to the clerk of the county court of said county, and the said clerk having called said election in accordance therewith and having given due notice of the time and place of holding the same, as required by law and the act aforesaid.

"In witness whereof the chairman of the board of supervisors of said county, by order thereof, has hereto affixed his signature officially this fourth day of May, A. D. 1869.

"DAVID H. SHONTS, [SEAL.]

"*Chairman of Board of Supervisors of Kendall Co.*

(Written across the face in red ink:) "One thousand dollars.

"All of which is attested by the clerk of the county court of said county, and ex-officio clerk of said board of supervisors, under his hand and the seal of said court, at Yorkville, this 4th day of May, A. D. 1869.

[SEAL KENDALL CO. COURT.] "JEREMIAH EVARTS, *Clerk.*"

And the said Ottawa, Oswego & Fox River Valley Railroad Company afterwards, to wit, on the day and year last aforesaid, at, to wit,

the State of New York aforesaid, for value received, sold and transferred the said last-mentioned writing obligatory to the plaintiff, whereby said plaintiff then and there became the bearer and owner thereof, of all of which the said defendant then and there had due notice, to wit, at the district aforesaid; whereby an action hath accrued to the plaintiff to demand and have of and from the defendant the said sum of one thousand dollars in said last aforesaid writing obligatory mentioned, according to the tenor and effect thereof and of the sale and transfer thereof as aforesaid.

6. And for that whereas, also, the said defendant afterwards, to wit, on the 4th day of May, A. D. 1869, made its certain other writing obligatory, commonly called a railroad bond, sealed with the official seal of said county of Kendall and the private seal of the chairman of said board of supervisors, and also attested by the signature of the clerk of said board, and now to the court here shown, the date whereof is the day and year aforesaid, and then and there delivered said last aforesaid writing obligatory to the Ottawa, Oswego and Fox River Valley Railroad Company; and which said last aforesaid writing obligatory is in the words and figures following, to wit:

9 [50-c. rev. stamp.]

"No. 11.] [$1,000.

"*Ten per cent. bond.*

"UNITED STATES OF AMERICA,

"*State of Illinois, County of Kendall:*

"The county of Kendall, in the State of Illinois, acknowledges itself indebted in the sum of one thousand dollars, lawful money of the United States of America, which sum the said county of Kendall promise to pay to the Ottawa, Oswego & Fox River Valley Railroad Company, or to the bearer hereof, at the Fourth National Bank in the city of New York, three years from the first day of July, A. D. 1869, with interest from the first day of July, A. D. 1869, at the rate of ten per cent. per annum, payable annually at said bank upon the presentation and delivery of the several coupons hereto annexed as they respectively become due; and to the payment of which said principal and interest in the manner aforesaid the faith and revenue of said county is hereby irrevocably pledged. This bond is one of a series of fifty bonds bearing even date herewith, each for the sum of one thousand dollars, numbered from one to fifty, inclusive, and is issued in pursuance of an election held in said county on the 30th day of March, A. D. 1869, under and by virtue of a certain act of the legislature of said State of Illinois, approved February 18th, 1857, entitled 'An act authorizing certain cities, counties, incorporated towns, and townships to subscribe to the stock of certain railroads,' the said act having special reference to the said Ottawa, Oswego, and Fox River Valley Railroad Company, at which election a majority of the legal voters participating at the same voted 'for subscription' to the capital stock of said railroad in the sum of fifty thousand dollars and to issue the bonds of said county therefor; and the said election was by the proper authorities duly declared carried 'for subscription,' previous application, in writing, of fifty legal voters of said county for said election, specifying the amount to be subscribed and the conditions of such subscription, having been made to the clerk of the court of said county, and the said clerk having called

said election in accordance therewith and having given due notice of the time and place of holding the same, as required by law and the act aforesaid.

"In witness whereof the chairman of the board of supervisors of said county, by order thereof, has hereto affixed his signature officially this fourth day of May, A. D. 1869.

"DAVID H. SHONTS, [SEAL.]
"*Chairman of Board of Supervisors of Kendall Co.*

(Written across the face in red ink:) "One thousand dollars.

"All of which is attested by the clerk of the county court of said county and ex-officio clerk of said board of supervisors under his hand and the seal of said court at Yorkville, this 4th day of May, A. D. 1869.

[SEAL CO. COURT, KENDALL CO.] "JEREMIAH EVARTS,
*Clerk.*"

And the said Ottawa, Oswego & Fox River Valley Railroad Company afterwards, to wit, on the day and year last aforesaid, at, to wit, the State of New York aforesaid, for value received, sold and transferred said last aforesaid writing obligatory to the plaintiff, whereby
10 the said plaintiff then and there became the bearer and owner thereof, of all of which said defendant then and there had due notice, to wit, at the district aforesaid; whereby an action hath accrued to the plaintiff to demand and have of and from the defendant said sum of one thousand dollars in said last aforesaid writing obligatory mentioned, according to the tenor and effect thereof and of the sale and transfer thereof as aforesaid.

7. For that whereas the said defendant afterwards, to wit, on the 4th day of May, A. D. 1869, at, to wit, the district aforesaid, made its certain other writing obligatory, commonly called a railroad bond, sealed with the official seal of said county of Kendall and with the private seal of said board of supervisors, and also attested by the signature of the clerk of said board, and now to the court here shown, the date whereof is the day and year last aforesaid, and then and there delivered the said last aforesaid writing obligatory to the Ottawa, Oswego & Fox River Valley Railroad Company; and which said last aforesaid writing obligatory is in the words and figures following, to wit:

[50c. rev. stamp.]

"No. 12.] [$1,000

"UNITED STATES OF AMERICA,
"*State of Illinois, County of Kendall:*

"*Ten per cent. bond.*

"The county of Kendall, in the State of Illinois, acknowledges itself indebted in the sum of one thousand , lawful money of the United States of America; which sum the said county of Kendall promise' to pay to the Ottawa, Oswego & Fox River Valley Railroad Company, or to the bearer hereof, at the Fourth National Bank in the city of New York, three years from the first day of July, A. D. 1869, with interest from the first day of July, A. D. 1869, at the rate of ten per cent. per annum, payable annually at said bank upon the presentation and de-

livery of the several coupons hereto annexed as they respectively become due; and to the payment of said principal and interest in the manner aforesaid, the faith and revenue of said county is hereby irrevocably pledged.

"This bond is one of a series of fifty bonds bearing even date herewith, each for the sum of one thousand dollars, numbered from one to fifty, inclusive, and issued in pursuance of an election held in said county on the 30th day of March, A. D. 1869, under and by virtue of a certain act of the legislature of said State of Illinois, approved February 18th, 1857, entitled 'An act authorizing certain cities, counties, incorporated towns, and townships to subscribe to the stock of certain railroads,' the said act having special reference to the said Ottawa, Oswego and Fox River Valley Railroad Company, at which election a majority of the legal voters participating at the same voted 'for subscription' to the capital stock of said railroad in the sum of fifty thousand dollars, and to issue the bonds of said county therefor, and the said election was by the proper authorities duly declared carried 'for subscription,' previous application in writing of fifty legal voters of said county for said election, specifying the amount to be subscribed and the conditions of said subscription, having been made to the clerk of the county court of said county, and the said clerk having called said election in
11 accordance therewith, and having given due notice of the time and place of business of holding the same, as required by law and the act aforesaid.

"In witness whereof the chairman of the board of supervisors of said county, by order thereof, has hereto affixed his signature officially, this fourth day of May, A. D. 1869.

"DAVID H. SHORTS, [SEAL.]
"*Chairman of Board of Supervisors of Kendall Co.*

(Written across the face in red ink:) "One thousand dollars.

"All of which is attested by the clerk of the county court of said county, and ex-officio clerk of said board of supervisors, under his hand and the seal of court, at Yorkville, this 4th day of May, A. D. 1869.

{ SEAL OF COUNTY COURT, KENDALL CO. } "JEREMIAH EVARTS,
"*Clerk.*"

And the said Ottawa, Oswego and Fox River Valley Railroad Company afterwards, to wit, on the day and year last aforesaid, at, to wit, the State of New York aforesaid, sold, transferred, and delivered the said last aforesaid writing obligatory to the plaintiff, whereby the said plaintiff then and there became the bearer and owner thereof, of all of which the said defendant then and there had due notice, to wit, at the district aforesaid, by means whereof an action hath accrued to the plaintiff to demand and have of and from the said defendant the said sum of one thousand dollars in said last aforesaid writing obligatory mentioned, according to the tenor and effect thereof and of the sale and transfer thereof as aforesaid.

8. And for that whereas, also, the said defendant afterwards, to wit, on the 4th day of May, A. D. 1873, at, to wit, the district aforesaid, made its certain other writing obligatory, commonly called a railroad bond, sealed with the official seal of the said county of Kendall, and with the private seal of said board of supervisors, and also attested by the signature of the clerk of said board, and now to the court here shown, the date thereof is the day and year last aforesaid, and then and there delivered the said last aforesaid writing obligatory to the Ottawa,

Oswego & Fox River Valley Railroad Company; and which last aforesaid writing obligatory is in the words and figures following, to wit:

[5-ct. rev. stamp.]

"No. 13. $1,000.

"UNITED STATES OF AMERICA,
"*State of Illinois, County of Kendall:*

"*Ten per cent. bond.*

"The county of Kendall, in the State of Illinois, acknowledges itself indebted in the sum of one thousand dollars, lawful money of the United States of America, which sum the said county of Kendall promise to pay to the Ottowa, Oswego and Fox River Valley Railroad Company, or to the bearer hereof, at the Fourth National Bank, in the city of New York, three years from the first day of July, A. D. 1869, with interest from the first day of July, A. D. 1869, at the rate of ten per cent. per annum, payable annually at said bank upon the presentation and
12 delivery of the several coupons hereto annexed as they respectively become due, and to the payment of said principal and interest in the manner aforesaid the faith and revenue of said county is hereby irrevocably pledged.

"This bond is one of a series of fifty bonds bearing even date herewith, each for the sum of one thousand dollars, numbered from one to fifty, inclusive, and is issued in pursuance of an election held in said county on the 30th day of March, A. D. 1869, under and by virtue of a certain act of the legislature of said State of Illinois, approved February 18th, 1857, entitled 'An act authorizing certain cities, counties, incorporated towns, and townships to subscribe to the stock of certain railroads,' the said act having special reference to the said Ottawa, Oswego & Fox River Valley Railroad Company, at which election a majority of the legal voters participating at the same voted for subscription to the capital stock of said railroad in the sum of fifty thousand dollars, and to issue the bonds of said county therefor; and the said election was, by the proper authorities, duly declared carried 'for subscription,' previous application, in writing, of fifty legal voters of said county for said election, specifying the amount to be subscribed and the conditions of said subscription, having been made to the clerk of the county court of said county; and the said clerk having called said election in accordance therewith, and having given due notice of the time and place of holding the same, as required by law and the act aforesaid.

"In witness whereof the chairman of the board of supervisors of said county, by order thereof, has hereto affixed his signature, officially, this fourth day of May, A. D. 1869.

"DAVID H. SHORTS, [SEAL.]
"*Chairman of Board of Supervisors of Kendall Co.*

(Written across the face in red ink:) "One thousand dollars.

"All of which is attested by the clerk of the county court of said county, and ex-officio clerk of said board of supervisors, under his hand and the seal of said court, at Yorkville, this 4th day of May, A. D. 1869.

{ SEAL COUNTY CT., KENDALL CO. }

"JEREMIAH EVARTS,
"*Clerk.*"

And the said Ottawa, Oswego & Fox River Valley Railroad Company afterwards, to wit, on the day and year last aforesaid, at, to wit, the State of New York aforesaid, for value received, sold, transferred, and delivered the said writing obligatory last mentioned to the plaintiff, whereby said plaintiff then and there became the owner and bearer thereof, of all of which the defendant then and there had due notice, to wit, at the district aforesaid, by means whereof an action hath ac'*urr*ed to the plaintiff to demand and have of and from the said defendant the said sum of one thousand dollars in said last aforesaid writing obligatory mentioned, according to the tenor and effect thereof and of the sale and transfer thereof as aforesaid.

9. And for that whereas, also, the defendant afterwards, to wit, on the 4th day of May, A. D. 1869, at, to wit, the district aforesaid, made its certain other writing obligatory, commonly called a railroad bond, sealed with the official seal of said county of Kendall, and with the private seal of the chairman of said board of supervisors, and also attested by the signature of the clerk of said board, and now to the court here shown; the date thereof is the day and year aforesaid; and said defendant then and there delivered said last aforesaid writing obligatory to the Ottawa, Oswego and Fox River Valley Railroad Company; and which said writing obligatory is in the words & figures following, to wit:

13

[50 ct. rev. stamp.]

"No. 14. $1,000.

"UNITED STATES OF AMERICA,
*State of Illinois, County of Kendall:*

"*Ten per cent. bond.*

"The county of Kendall, in the State of Illinois, acknowledges itself indebted in the sum of one thousand dollars lawful money of the United States of America, which sum the said county of Kendall promise to pay to the Ottawa, Oswego & Fox River Valley Railroad Company, or to the bearer hereof, at the Fourth National Bank, in the city of New York, three years from the first day of July, A. D. 1869, with interest from the first day of July, A. D. 1869, at the rate of ten per cent per annum, payable annually at said bank upon the presentation and delivery of the several coupons hereto annexed as they respectively become due, and to the payment of said principal and interest in the manner aforesaid the faith and revenue of said county is hereby irrevocably pledged.

"This bond is one of a series of fifty bonds bearing even date herewith, each for the sum of one thousand dollars, numbered from one to fifty inclusive, and is issued in pursuance of an election held in said county on the 30th day of March, A. D. 1869, under and by virtue of a certain act of the legislature of said State of Illinois, approved February 18th, 1857, entitled 'An act authorizing certain cities, counties, incorporated towns, and townships to subscribe to the stock of certain railroads,' the said act having special reference to the said Ottawa, Oswego & Fox River Railroad Company, at which election a majority of the legal voters participating at the same voted 'for subscription' to the capital stock of said railroad in the sum of fifty thousand dollars, and to issue the bonds of said county therefor; and the said election was, by the proper authorities, duly declared carried for subscription,

previous application in writing of fifty legal voters of said county for said election, specifying the amount to be subscribed, and the conditions of such subscription, having been made to the clerk of the county court of said county, and the said clerk having given due notice of the time and place of holding the same as required by law, and the act aforesaid. In witness whereof the chairman of the board of supervisors of said county, by order thereof, has hereto affixed his signature officially this fourth day of May, A. D. 1869.

"DAVID H. SHORTS, [SEAL.]
"*Chairman of Board of Supervisors of Kendall Co.*

(Written across the face in red ink:) "One thousand dollars.

"All of which is attested by the clerk of the county court of said county, and ex-officio clerk of said board of supervisors, under his hand and the seal of said court, at Yorkville, this 4th day of May, A. D. 1869.

{ SEAL COUNTY CT. KENDALL CO. } "JEREMIAH EVARTS,
"*Clerk.*"

And the said Ottawa, Oswego & Fox River Valley Railroad Company afterwards, to wit, on the day & year last aforesaid, at, to wit,
14 the State of New York aforesaid, for value received, sold and transferred said last aforesaid writing obligatory to the plaintiff, whereby said plaintiff then and there became the bearer and owner thereof, of all of which defendant then and there had due notice; by means whereof an action hath accrued to the plaintiff to demand and have of and from the defendant the said sum of one thousand dollars in said last aforesaid writing obligatory mentioned, according to the tenor and effect thereof, and of the sale and transfer thereof aforesaid.

10. And for that whereas, also, the said defendant afterwards, to wit, on the 4th day of May, A. D. 1869, at, to wit, the district aforesaid, made its certain other writing obligatory, commonly called a railroad bond, sealed with the official seal of the said county of Kendall, and with the private seal of said board of supervisors, and also attested by the signature of the clerk of said board, and now to the court here shown, the date whereof is the day and year aforesaid; and which said last aforesaid writing obligatory the defendant then and there delivered to the Ottawa, Oswego and Fox River Valley Railroad Company; said writing obligatory last aforesaid is in the words and figures following, to wit:

[50-c. rev. st'p.]

"No. 15. $1,000.

"UNITED STATES OF AMERICA,
"*State of Illinois, County of Kendall:*

"*Ten per cent. bond.*

"The county of Kendall, in the State of Illinois, acknowledges itself indebted in the sum of one thousand dollars lawful money of the United States of America, which sum the said county of Kendall promise to pay to the Ottawa, Oswego and Fox River Valley Railroad Company,

or to the bearer hereof, at the Fourth National Bank, in the city of New York, three years from the first day of July, A. D. 1869, with interest from the first day of July, A. D. 1869, at the rate of ten per cent. per annum, payable annually at said bank upon the presentation and delivery of the several coupons hereto annexed, as they respectively become due, and to the payment of said principal and interest in the manner aforesaid the faith and revenue of said county is hereby irrevocably pledged.

"This bond is one of a series of fifty bonds bearing even date herewith, each for the sum of one thousand dollars, numbered from one to fifty, inclusive, and is issued in pursuance of an election held in said county on the 30th day of March, A. D. 1869, under and by virtue of a certain act of the legislature of the said State of Illinois, approved February 18th, 1857, entitled 'An act authorizing certain cities, counties, incorporated towns, and townships to subscribe to the stock of certain railroads,' the said act having special reference to the said Ottawa and Fox River Valley Railroad Company, at which election a majority of the legal voters participating at the same voted 'for subscription' to the capital stock of said railroad in the sum of fifty thousand dollars, and to issue the bonds of said county therefor; and the said election was, by the proper authorities, duly declared carried 'for subscription,' previous application in writing of fifty legal voters of said county for said election, specifying the amount to be subscribed and the
15 conditions of such subscription, having been made by the clerk of the county court of said county, and the said clerk having called said election in accordance therewith, and having given due notice of the time and place of holding the same, as required by law and the act aforesaid.

"In witness whereof the chairman of the board of supervisors of said county, by order thereof, has hereto affixed his signature officially, this fourth day of May, A. D. 1869.

"DAVID H. SHORTS, [SEAL.]
"*Chairman of the Board of Supervisors of Kendall Co.*

(Written across the face in red ink:) "One thousand dollars.

"All of which is attested by the clerk of the county court of said county and ex-officio clerk of said board of supervisors, under his hand and the seal of said court, at Yorkville, this 4th day of May, A. D. 1869.

{ SEAL COUNTY COURT } "JEREMIAH EVARTS,
{ OF KENDALL COUNTY. } "*Clerk.*"

And the said Ottawa, Oswego and Fox River Valley Railroad Company afterward, to wit, on the day and year last aforesaid, at, to wit, the State of New York aforesaid, sold, transferred, and delivered the said last aforesaid writing obligatory to the plaintiff, and said plaintiff thereby then and there became the bearer and owner thereof, of all of which the defendant then had due notice, to wit, at the district aforesaid, by means whereof an action hath accrued to the plaintiff to demand and have of and from the defendant the said sum of one thousand dollars in said last aforesaid writing obligatory mentioned, according to the tenor and effect thereof, and of the sale and transfer thereof aforesaid.

11. And for that whereas, also, the said defendant afterwards, to wit, on the 4th day of May, A. D. 1869, at, to wit, the district aforesaid, made its certain other writing obligatory, commonly called a railroad bond,

sealed with the official seal of the said county of Kendall and with the private seal of the chairman of said board of supervisors, attested also by the signature of the clerk of said board, and now to the court here shown, the date whereof is the day and year last aforesaid, and said defendant then and there delivered the same to the Ottawa, Oswego and Fox River Valley Railroad Company; and which said last-mentioned writing obligatory is in the words and figures following:

[50c. rev. stamp.]

"No. 16. $1,000.

"UNITED STATES OF AMERICA,
"*State of Illinois, County of Kendall:*

"*Ten per cent. bond.*

"The county of Kendall, in the State of Illinois, acknowledges itself indebted in the sum of one thousand dollars lawful money of the United States of America, which sum the said county of Kendall promise to pay to the Ottawa, Oswego and Fox River Valley Railroad Company, or to the bearer hereof, at the Fourth National Bank, in the city of New York, three years from the first day of July, A. D. 1869, with interest from the first day of July, A. D. 1869, at the rate of ten per cent.
16 per annum, payable annually at said bank upon the presentation and delivery of the several coupons hereto annexed as they respectively become due; and to the payment of said principal and interest in the mannner aforesaid the faith and revenue of said county is hereby irrevocably pledged.

"This bond is one of a series of fifty bonds bearing even date herewith, each for the sum of one thousand dollars, numbered from one to fifty, inclusive, and is issued in pursuance of an election held in said county on the 30th day of March, A. D. 1869, under and by virtue of a certain act of the legislature of said State of Illinois, approved February 18th, 1857, entitled 'An act authorizing certain cities, counties, incorporated towns, and townships to subscribe to the stock of certain railroads,' the said act having special reference to the said Ottawa, Oswego and Fox River Valley Railroad Company, at which election a majority of the legal voters participating at the same voted 'for subscription' to the capital stock of said railroad in the sum of fifty thousand dollars, and to issue the bonds of said county therefor, and the said election was, by the proper authorities, duly declared carried 'for subscription,' previous application in writing of fifty legal voters of said county for said election, specifying the amount to be subscribed and the conditions ot said subscription, having been made to the clerk of the county court of said county, and the said clerk having called said election in accordance therewith, and having given due notice of the time and place of holding the same, as required by law and the act aforesaid.

"In witness whereof the chairman of the board of supervisors of said county, by order thereof, has hereto affixed his signature officially this fourth day of May, A. D. 1869.

"DAVID A. SHORTS, [SEAL.]
"*Chairman of Board of Supervisors of Kendall Co.*

(Writ'en across the face in red ink:) "One thousand dollars.

"All of which is attested by the clerk of the county court of said county and ex-officio clerk of said board of supervisors, under his hand and the seal of said court, at Yorkville, this 4th day of May, A. D. 1869.

{ SEAL COUNTY COURT } "JEREMIAH EVARTS,
{ KENDALL COUNTY. } "*Clerk.*"

And the said Ottawa, Oswego and Fox River Valley Railroad Company afterwards, to wit, on the day and year last aforesaid, at, to wit, the State of New York aforesaid, sold, transferred, and delivered the last-mentioned writing obligatory to the plaintiff, and said plaintiff then and there thereby became the bearer and owner thereof; of all of which the defendant had due notice, to wit, at the district aforesaid; by means whereof an action hath accrued to the plaintiff to demand and have of and from the said defendant the said sum of one thousand dollars in said last aforesaid writing obligatory mentioned, according to the tenor and effect thereof, and of the sale and transfer thereof as aforesaid.

12. And for that whereas, also, the said defendant afterward, to wit, on the 4th day of May, A. D. 1869, at, to wit, the district aforesaid, made its certain other writing obligatory, commonly called a railroad bond, sealed with the official seal of said county of Kendall and with the private seal of the chairman of said board of supervisors, and also attested by the clerk of said board, and now to the court here
17 shown, the date whereof is the day and year last aforesaid, and said defendant then and there delivered the same to the Ottawa, Oswego and Fox River Valley Railroad Company; and which said writing obligatory is in the words and figures following:

[50 c. rev. stamp.]

"No. 17. $1,000.

"UNITED STATES OF AMERICA,
"*State of Illinois, County of Kendall:*

"*Ten per cent. bond.*

"The county of Kendall, in the State of Illinois, acknowledges itself indebted in the sum of one thousand dollars lawful money of the United States of America, which sum the said county of Kendall promise' to pay to the Ottawa, Oswego and Fox River Valley Railroad Company, or to the bearer hereof, at the Fourth National Bank, in the city New York, three years from the first day of July, A. D. 1869, with interest from the first day of July, A. D. 1869, at the rate of ten per cent. per annum, payable annually at said bank upon the presentation and delivery of the several coupons hereto annexed, as they respectively become due; and to the payment of said principal and interest in the manner aforesaid the faith and revenue of said county is hereby irrevocably pledged.

"This bond is one of a series of fifty bonds bearing even date herewith, each for the sum of one thousand dollars, numbered from one to fifty, inclusive, and is issued in pursuance of an election held in said county on the 30th day of March, A. D. 1869, under and by virtue of a certain act of the legislature of said State of Illinois, approved February 18th, 1857, entitled 'An act authorizing certain cities, counties, incorporated

towns, and townships to subscribe to the stock of certain railroads,' the said act having special reference to the said Ottawa, Oswego and Fox River Valley Railroad Company, at which election a majority of the legal voters participating at the same voted 'for subscription' to the capital stock of said railroad in the sum of fifty thousand dollars, and to issue the bonds of said county therefor; and the said election was, by the proper authorities, duly declared carried 'for subscription,' previous application having been made to the clerk of the county court of said county, and the said clerk having called said election in accordance therewith, and having given due notice of the time and place of holding the same, as required by law and the act aforesaid.

"In witness whereof the chairman of the board of supervisors thereof has hereto affixed his signature officially this fourth day of May, A. D. 1869.

"DAVID H. SHORTS, [SEAL.]
"*Chairman of Board of Supervisors of Kendall Co.*

(Written across the face in red ink:) "One thousand dollars.

"All of which is attested by the clerk of the county court of said county and ex-officio clerk of said board of supervisors, under his hand and the seal of said court, at Yorkville, this 4th day of May, A. D. 1869.

[SEAL CO. CT. KENDALL CO.] "JEREMIAH EVARTS, *Clerk.*"

And the said Ottawa, Oswego and Fox River Valley Railroad
18 Company afterwards, to wit, on the day and year last aforesaid, at, to wit, the State of New York aforesaid, for value received, sold, transferred, and delivered the said last aforesaid writing obligatory to the plaintiff, and said plaintiff thereby then and there became the bearer and owner thereof; of all of which defendant then and there had due notice, to wit, at the district aforesaid; whereby an action hath accrued to the plaintiff to demand and have of and from the defendant the said sum of one thousand dollars in said last aforesaid writing obligatory mentioned, according to the tenor and effect thereof and of the sale and transfer thereof as aforesaid.

13. And for that whereas, also, the said defendant afterwards, to wit, on the 4th day of May, A. D. 1869, at, to wit, the district aforesaid, made its certain other writing obligatory, commonly called a railroad bond, sealed with the official of the said county of Kendall and with the private seal of the chairman of said board of supervisors, attested also by the signature of the clerk of said board, and now to the court here shown, the date whereof is the day and year last aforesaid, and defendant then and there delivered the same to the Ottawa, Oswego and Fox River Valley Railroad Company; and which said last aforesaid writing obligatory is in the words and figures following, to wit:

[50 ct. rev. stamp.]

"No. 18. $1,000.

"UNITED STATES OF AMERICA,
"*State of Illinois, County of Kendall:*

"*Ten per cent. bond.*

"The county of Kendall, in the State of Illinois, acknowledges itself indebted in the sum of one thousand dollars, lawful money of the United

States of America, which sum the said county of Kendall promise' to pay to the Ottawa, Oswego and Fox River Valley Railroad Company, or to the bearer hereof, at the Fourth National Bank, in the city of New York, three years from the first day of July, A. D. 1869, with interest from the first day of July, A. D. 1869, at the rate of ten per cent. per annum, payable annually at said bank upon the presentation and delivery of the several coupons hereto annexed as they respectively become due; and to the payment of said principal and interest in the manner aforesaid the faith and revenue of said county is hereby irrevocably pledged.

"This bond is one of a series of fifty bonds bearing even date herewith, each for the sum of one thousand dollars, numbered from one to fifty inclusive, and is issued in pursuance of an election held in said county on the 30th day of March, A. D. 1869, under and by virtue of a certain act *of a certain act* of the legislature of said State of Illinois, approved February 18th, 1857, entitled 'An act authorizing certain cities, counties, incorporated towns, and townships to subscribe to the stock of certain railroads,' the said act having special reference to the said Ottawa, Oswego and Fox River Valley Railroad Company, at which election a majority of the legal voters participating at the same voted 'for subscription' to the capital stock of said railroad in the sum of fifty thousand dollars, and to issue the bonds of said county therefor, and the said election was by the proper authorities duly declared carried for subscription, previous application in writing of fifty legal voters of said county for said election, specifying the amount to be subsribed and the conditions of such subscriptions, having been made
19 to the clerk of the county court of said county, and the said clerk having called said election in accordance therewith, and having given due notice of the time and place of holding the same as required by law and the act aforesaid. In witness whereof the chairman of the board of supervisors of said county, by order thereof, has hereto affixed his signature officially this fourth day of May, A. D. 1869.

[SEAL.] "DAVID H. SHORTS,

"*Chairman of Board of Supervisors of Kendall Co.*

(Written across the face in red ink:) "One thousand dollars.

"All of which is attested by the clerk of the county court of said county and ex-officio clerk of said board of supervisors, under his hand and the seal of said court, at Yorkville, this 4th day of May, A. D. 1869.

[SEAL CO. CT. KENDALL CO.] "JEREMIAH EVARTS, *Clerk.*"

And the said Ottawa, Oswego and Fox River Valley Railroad Company afterwards, to wit, on the day and year last aforesaid, at, to wit, the State of New York aforesaid, for value received, sold, transferred, and delivered the said last aforesaid writing obligatory to the plaintiff, and said plaintiff thereby then and there became the bearer and owner thereof, of all of which the defendant then and there had due notice, to wit, at the district aforesaid.

By means whereof an action hath accrued to the plaintiff to demand and have of and from the defendant the said sum of one thousand dollars in said last aforesaid writing obligatory mentioned, according to the tenor and effect thereof, and of the sale and transfer thereof aforesaid.

And for that whereas also the said defendant afterwards, to wit, on the 1st day of January, A. D. 1873, at, to wit, the district aforesaid, became and was indebted to the plaintiff in the further sum of five thou-

sand dollars, good and lawful money of the United States of America, as interest upon and for the forbearance of divers large sums of money before then due and owing by the defendant to the plaintiff, and by the plaintiff forborne to the defendant for divers long spaces of time before then elapsed, at its request; and being so indebted, the defendant, in consideration thereof, afterwards, to wit, on the day and year last aforesaid, at, to wit, the district aforesaid, undertook and then and there agreed to pay to the plaintiff the said sum of five thousand dollars in this count mentioned, when it, the defendant, should be thereunto afterwards requested.

Nevertheless, the defendant, though often requested so to do, has not as yet paid the plaintiff said several sums of money in this declaration mentioned, or any or either of them, or any part thereof, but to pay him the same the defendant has hitherto wholly neglected and refuse', and still refuses, to the damage of the plaintiff in the sum of twenty thousand dollars; and therefore he brings his suit, &c.

HAY, GREENE & LITTLER,
*His Attorneys.*

(Endorsed:) Filed July 10, 1873. Wm. H. Bradley, cl'k.

Afterwards, to wit, on the 25th day of July, A. D. 1873, a writ of summons issued out of said clerk's office in said-entitled cause; which said writ, together with the return of the marshal annexed, is in words and figures following, to wit:

20 *Summons.*

Circuit court of the United States of America, northern district of Illinois, *ss:*

The United States of America to the marshal of the northern district of Illinois, greeting:

We command you to summon The Board of Supervisors of Kendall County, if found in your district, to be and appear before our judges of our circuit court of the United States for the northern district of Illinois, on the first day of the next term thereof, to be holden at Chicago, in the district aforesaid, on the first Monday of October next, to answer unto Augustus T. Post in a plea of debt twenty thousand dollars, to his damage, as he alleges, of twenty thousand dollars; and have you then and there this writ.

Witness the Hon. Nathan Clifford, Acting Chief Justice of the Supreme Court of the United States of America, at Chicago aforesaid, this 25 day of July, in the year of our Lord one thousand eight hundred and seventy-three, and of our Independence the 98th year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

*Special deputy's return.*

UNITED STATES OF AMERICA,
*Northern District of Illinois, ss:*

Know all men by these presents that I have appointed, and by these presents do appoint, my true and lawful deputy to execute the annexed writ, Aug. T. Post vs. The Board of Supervisors of Kendall Co., and to make true return of the execution thereof according to law.

B. H. CAMPBELL, [SEAL.]
*United States Marshal for the Northern District of Illinois.*

I have this 5th day of September, A. D. 1873, executed the annexed writ by delivering a true copy thereof to Chas. Raymond, the chairman of the board of supervisors of said county, and also by delivering a true copy thereof to Jeremiah Evarts, clerk of the board of supervisors of the within-named county therein named.

B. H. CAMPBELL,
*United States Marshal for the Northern District of Illinois,*
By FRANK R. SMILEY,
*Special Deputy.*

Frank R. Smiley, being first duly sworn, deposes and says that he served the annexed writ as stated in the foregoing return.

Sworn to before me this 13 day of September, A. D. 187 .

P. A. HORYNE, *U. S. Com'r.*

(Endorsed:) Filed Oct. 1st, A. D. 1873. Wm. H. Bradley, clerk.

Afterwards, to wit, on the 15th day of October, A. D. 1873, the said defendant, The Board of Supervisors of Kendall County, by its attorney, T. Lyle Dickey, filed in said clerk's office its pleas; which said pleas, as finally amended, are in the words and figures following, to wit:

21 *Pleas.*

In the circuit court of the United States in & for the northern district of Illinois, to the October term, 1873.

AUGUSTUS T. POST
*vs.*
THE BOARD OF SUPERVISORS OF KENDALL County. } Action, debt.

And the said defendant comes, by T. Lyle Dickey, its attorney, and defends the wrong & injury when, &c., and, for plea to each of the first thirteen counts in said declaration, respectively, says as to each of said counts that said supposed writing obligatory mentioned is not the deed of the said county of Kendall; & of this it puts itself upon the country, &c.

DICKEY, *for Def't.*

2D PLEA.—And for a further plea to each of the first thirteen counts in plaintiff's said declaration, defendant says as to each of said counts & the matters therein respectively alleged, that plaintiff ought not to have & maintain his said action by reason of said count & the matters therein alleged, because defendant says that said supposed "act of the legislature of said State of Illinois, approved February 18th, 1857" (mentioned in the recitals in said supposed bond, which is set out in count), never did become and never was a law of the State of Illinois, in this, that said supposed "act of the legislature" purports to have been enacted by the people of the State of Illinois, represented in the general assembly, at the regular session thereof, convened on the 5th day of January, A. D. 1857, and that upon the journals of the proceedings of each house of said general assembly, kept in pursuance of the 13th section of the 3d article of the then constitution of said State, were made the following entries relating to a bill for said supposed act of said legislature and no other or further entries relating to said act, or to any bill for such act, were ever made upon the said journals or

upon either of them; that is to say, upon the journal of the house of representatives of said general assembly so kept, it appears from the entries therein that on the 22d day of January, A. D. 1857, there was introduced "a bill for an act authorizing certain cities, counties, incorporated towns, & townships to subscribe to the stock of certain railroads," and that said bill was on that day read a first time in said house and ordered to a second reading, and by order of the said house the rule was dispensed with, & that said bill was on that day read a second time by its title, and referred to the committee on internal improvements. And that on the 4th day of February, A. D. 1857, said bill was reported back to said house of representatives from said committee, without amendment, & with a recommendation from said committee that said bill should be passed, & that on that day said bill was by said house of representatives "ordered to a third reading." And that on the 14th day of February, A. D. 1857, said bill was taken up in said house of representatives and read a third time and passed by said house, and that the vote upon said final passage of said bill in said house was by ayes and noyes, and on said final passage the vote taken was 54 "ayes" and no "nays," and that on that day it was ordered by the said house that the title of said bill be as aforesaid, and that the clerk inform the senate thereof and ask the concurrence of the
22 senate therein. And upon the journal of the senate of said general assembly, so kept, it appears from the entries of the proceedings of said senate in said journal that on the 14th day of February, A. D. 1857, said bill so passed as aforesaid by said house of representatives was duly presented to said senate from said house of representatives, and that the senate was, in behalf of said house, informed of the passage of said bill by said house of representatives, and the concurrence of the said senate in the passage thereof was requested, and that on the 16th day of February, A. D. 1857, said bill came up in said senate, and was read a first time in said senate, and ordered by said senate to a second reading, and that the rule was suspended, and said bill was on that day read a second time by its title and referred by said senate to the committee on banks & corporations. And upon the journal of the proceedings of said house of representatives of said general assembly, so kept, it appears from the entries of the proceedings therein that on the 17th day of February, A. D. 1857, a message from the senate, by Mr. Wyatt, assistant secretary, was received by said house of representatives, which was as follows, viz:

"Mr. SPEAKER: I am directed to inform the house of representatives that the senate have concurred with them in the passage of the following bills, viz, * * * a bill for 'An act authorizing certain cities, counties, incorporated towns, & townships to subscribe to the stock of certain railroads;'" and that on the same day said bill was duly reported (from the committe of said house of representatives on engrossed & enrolled bills) as correctly enrolled. And that on the 18th day of February, A. D. 1857, a message was received by said house of representatives from the governor of said State, informing them that the said governor had approved and signed said bill.

And defendant further avers that no other proceedings than those above stated as appearing from the entries upon said journals were ever had or done by the said general assembly, or by either house thereof, relating to said bill, or relating to any bill for said supposed "act of the legislature," and that no other proceedings of either said senate or said house of representatives, relating to said bill or relating to any bill for said supposed act of said legislature, were ever entered

in the said journal of said senate or in the journal of said house of representatives, and that no other bill for said supposed act of said legislature, or relating thereto, was ever introduced into either house of said general assembly, or acted upon either by said house of representatives or by said senate. And that said bill for said supposed act of said legislature was not in fact read on three different days in said senate, nor was the rule requiring that to be done ever dispensed with (so far as relates to a third reading of said bill) by said senate, as provided for in the then constitution of said State, and that said bill was never read in said senate a third time by its title or otherwise.

And that said bill was never put upon its final passage in said senate, nor was any vote taken in said senate, by ayes & nays, upon the final passage of said bill; nor was any such vote entered upon the journal of said senate; nor was there ever any vote taken in said senate relating to said bill upon the question, "Shall the bill pass?" nor was Mr. Wyatt, assistant secretary of the senate, or any other person, authorized or directed by said senate "to inform the house of representatives that the senate had concurred with the house in the passage of said bill, & so defendant says that said supposed act of the legislature of the State of Illinois," approved February 18th, 1857, never became or was a law of the State of Illinois. And defendant further avers that a majority of the qualified voters of said county of Ken-
23 dall (taking as a standard the number of votes thrown at the last general election previous the vote upon the question of the said supposed subscription of stock & the issue of said supposed bonds) did not vote in favor of the same. And defendant further avers that the election (in pursuance of which it is alleged said bond was issued) was not called by the board of supervisors of said county of Kendall.

And defendant further avers that the call for said election was not made thirty days before the holding of said election. And defendant further alle*d*ges that no notices for said election were issued thirty days before said election, and no notice for said election was given thirty days before said election; and that thirty days' notice of said election was not given by said board of supervisors. And defendant avers that the notices for said election did not specify the time the said proposed bonds were to run, nor did said notices specify the interest which said bonds were to bear; without this, that said supposed writing obligatory in said count mentioned is the deed of said county of Kendall, and this defendant is ready to verify, &c.

DICKEY, *for Def't.*

And for a plea to the 14th count in said plaintiff's declaration, defendant says actio non, because defendant says that said Kendall County does not owe the said sum of money above demanded in said count, or any part thereof, in manner & form as plaintiff hath in said count alleged; and of this the defendant puts itself upon the country, &c.

DICKEY, *for Def't.*

(Endorsed:) Filed Oct. 15, 1873. Wm. H. Bradley, cl'k.

Afterwards, to wit, on the 4th day of May, A. D. 1874, said plaintiff, by his attorneys, filed in said clerk's office his demurrer to said second plea; which said demurrer is in the words and figures following, to wit:

*Demurrer to 2nd plea.*

United States circuit court for northern district of Illinois, to the March term, 1874.

AUGUSTUS T. POST
*ats.*
THE BOARD OF SUPERVISORS OF KENDALL County. } Debt.

And the said plaintiff, as to the plea of the defendant by it secondly above pleaded, saith that the same and the matters therein contained in manner and form, as the same are above pleaded and set forth, are not sufficient in law to bar or preclude him, the said plaintiff, from having or maintaining his aforesaid action thereof against the said defendant, and that the said plaintiff is not bound by law to answer the same, and this the said plaintiff is ready to verify. Wherefore, by reason of the insufficiency of the said plea in this behalf the said plaintiff prays judgment and his damages, &c.

HAY, GREENE & LITTLER,
*Att'ys for Plaintiff.*

24 And the said plaintiff, according to the form of the statute in such case made and provided, states and shows to the court here the following causes of special demurrer to the said plea of the defendant by it secondly above pleaded, to wit:

1st. The plea contains divers new and immaterial matters in this, to wit, it recites the several steps taken by the said legislature of the State of Illinois in relation to the passage of the said law under and by virtue of which the bonds in said declaration mentioned were issued, and is not confined in its recitals and averments to the alleged defects of the journal of the said senate in relation to the passage of said law.

2d. The said plea contains more than one defense to said cause of action in this, to wit, it first alleges the non-passage of the law by the legislature of Illinois under which the said bonds purport to have been issued, and also alleges that a majority of the qualified voters of said county of Kendall (taking as a standard the number of votes thrown at the last general election previous to the vote upon the question of said supposed subscription) did not vote in favor of the same; said plea also avers that said election was not called by the proper authorities; that no sufficient notice of said election was given either as to the time of posting the same or as to the contents thereof, by reason of which said several matters contained in the said plea plaintiff avers that the same is bad for duplicity.

3. And also that the said plea should conclude with a verification and not to the country.

4. And also that the said plea is multifarious and uncertain:

5. And also that the said plea is in other respects uncertain, informal, and insufficient; wherefore, &c.

HAY, GREENE & LITTLER,
*Att'ys for Plaintiff.*

(Endorsed:) Filed May 4th, 1874. Wm. H. Bradley, clerk.

Afterwards, to wit, on the 5th day of May, in the adjourned May term, A. D. 1874, of said court, in the record of the proceedings thereof

in said-entitled cause, before the Hon. Thomas Drummond, judge, appears the following entry, to wit:

AUGUSTUS T. POST
*vs.*
THE BOARD OF SUPERVISORS OF KENDALL County. } Debt.

Now come the parties, by their attornies, and the defendant, by its attorney, confesses the special and general demurrer of the plaintiff to the second plea of the defendant filed herein, and on motion leave is given the defendant to amend its said second plea, the same to be done in two weeks.

Afterwards, to wit, on the 19th day of May, in the adjourned May term, A. D. 1874, of said court, in the record of the proceedings thereof in said-entitled cause, before the Hon. Thomas Drummond, judge, appears the following entry, to wit:

AUGUSTUS T. POST
*vs.*
THE BOARD OF SUPERVISORS OF KENDALL County. } Debt.

Now come the parties, by their attorneys, and on motion of the defendant, by its attorney, leave is given it to amend its second
25 plea herein, by striking therefrom the words "conclusion to the country," and by inserting therein in lieu thereof the words "and this the defendant is ready to verify," to which amended plea the plaintiff by leave of the court refiles his demurrer, and the same coming on now to be heard, after hearing a part of the arguments of counsel, the hour of adjournment having arrived, the further hearing is postponed until to-morrow morning.

Afterwards, to wit, on the 20th day of May, in the adjourned May term, A. D. 1874, of said court, in the record of the proceedings thereof in said-entitled cause, before the Hon. Thomas Drummond, judge, appears the following entry, to wit:

AUGUSTUS T. POST
*vs.*
THE BOARD OF SUPERVISORS OF KENDALL County. } Debt.

Now come again the parties, by their attorneys, and after hearing the concluding arguments of counsel upon the demurrer of the plaintiff to the amended second plea herein, the court, being sufficiently advised in the premises, sustains said demurrer.

Afterwards, to wit, on the 28th day of May, A. D. 1874, said defendant, by its attorneys, filed in said clerk's office the affidavit of Henry W. Farley, which is as follows:

In the circuit court of the United States in and for the northern district of Illinois, to the October term, 1873.

AUGUSTUS T. POST
*vs.*
THE BOARD OF SUPERVISORS OF KENDALL County. } Action, debt.

HENRY W. FARLEY, being duly sworn, deposes and says that he is a member of the board of supervisors of Kendall County, defendant in

the above-entitled suit, & that he is the chairman of a committee appointed by order of said board to conduct and manage in behalf of said county the defence of the county in said suit, & is the agent of the county in that behalf.

Affiant further says, upon information & belief & advice of counsel, that the alleged bonds upon which said above-named suit is brought were never executed by said county by any one having lawful authority to execute the same in behalf of said county, & that said supposed bonds are not, nor is either of them, the deed of said county; and that in that regard the pleas of the defendant filed in the above-entitled suit on the 15th of October, 1873, are true in substance & in fact.

HENRY W. FARLEY.

Sworn to & subscribed before me this 28th day of May, A. D. 1874.
WM. H. BRADLEY, *Clk.*

(Endorsed:) Filed May 28, '74. Wm. H. Bradley, cl'k.

Afterwards, to wit, on the 29th day of May, in the adjourned May term, A. D. 1874, of said court, in the record of the proceedings
26 thereof in said-entitled cause, before the Hon. Thomas Drummond, judge, appears the following entry, to wit:

AUGUSTUS T. POST
*vs.*
THE BOARD OF SUPERVISORS OF KENDALL County. } Debt.

Now come the parties, by their attorney, and upon issue joined thereupon, come a jury of good and lawful men, to wit: H. McCleary, W. Haven, G. Sammonds, F. Crow, W. Campbell, S. Hyman, J. Bennett, A. H. Palmer, Charles Miller, C. Roberts, J. M. Lomis, and C. Davis, who were all duly elected, tried, and sworn well and truly to try said issue, and after hearing the evidence and the arguments of counsel, and receiving the instructions of the court, the jury returned into court the following verdict, to wit: We, the jury, find the issue for the plaintiff, and find his debt in the sum of thirteen thousand dollars, and assess his damages for the detention of said debt to the sum of eleven hundred and eighty-eight dollars and five cents; and thereupon the defendant, by its attorney, moves the court for a new trial herein; and the court being now fully advised thereon overrules the same.

It is thereupon considered and adjudged by the court that the plaintiff do have and recover of the defendant the said sum of thirteen thousand dollars his debt, and the said sum of eleven hundred and eighty-eight dollars and five cents his damages, making in all the sum of fourteen thousand one hundred and eighty-eight dollars and five cents, for debt and damages, together with his costs and charges in this behalf expended, amounting to the sum of one hundred & thirty-eight dollars and fifty-five cents.

27 Afterwards, to wit, on the 15th day of May, A. D. 1877, in the adjourned May term of said court, in the record of the proceedings thereof in said-entitled cause, before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

AUGUSTUS T. POST
*v.*
THE BOARD OF SUPERVISORS OF KENDALL County.

Now comes the defendant, by its attorney, and files the mandate herein from the supreme court, and on motion of said attorney, it is ordered that the same be docketed.

Afterwards, to wit, on the 25th day of July, A. D. 1877, said plaintiff, by his attorneys, filed in said clerk's office his replications to the second plea of said defendant in said entitled cause; which said replications are in the words and figures following, to wit:

*Replications to second plea.*

UNITED STATES OF AMERICA,
*Northern District of Illinois:*

AUGUSTUS T. POST
*ats.*
BOARD OF SUPERVISORS OF KENDALL County. } Debt. July term, A. D. 1877.

And for replication to said defendant's second plea to said
28 plaintiff's declaration said plaintiff says precludi non, because he says that said act of the general assembly of the State of Illinois, approved February 18, 1857, was in all respects duly passed in accordance with the provisions of the then constitution of said State, because he says that the formal vote upon the passage of the bill for said act was taken by ayes and noes; a majority of all the members of said senate voting in favor of the passage of said bill, and said vote *is* taken was duly entered on the journal of said senate, as required by section 31 of article 3 of the then constitution of the State of Illinois; and this the said plaintiff prays may be enquired of by the court.

HAY, GREENE AND LITTLER,
*Att'ys for Plaintiff.*

And the defendant doth the like.

D. MCRAE, *Att'y for Def't.*

2. And for a further replication to said defendant's said second plea herein said plaintiff says precludi non, because he says that the defendant duly recognized the said act of the general assembly mentioned in said second plea as a law in full force and effect, and in pursuance thereof held an election, at which a majority of the legal voters par-
29 ticipating in the same voted for subscription to the capital stock of the Ottawa, Oswego and Fox River Valley Railroad Company, as set forth in the said bonds in said first thirteen counts in said plaintiff's declaration mentioned, and in pursuance of said election; and in conformity with the requirements of the said act of the general assembly the said defendant issued and delivered the said bonds to the said railroad company in payment of its subscription to the capital stock of said company; and the said railroad company thereupon delivered to the said defendant a like amount of the capital stock of said railroad company, which said stock the said defendant still retains,

and thereby became, and still is, a stockholder in said railroad corporation; and the said railroad company afterwards, and before the maturity of said bonds, &c., sold and delivered the same to the said plaintiff for full value; and plaintiff further avers that the defendant annually thereafter until, to wit, the first day of July, A. D. 1872, levied a tax to pay, and collected and paid, the interest on said bonds as it matured, and that after the maturity of said bonds and before the commencement of this suit said defendant levied and collected a tax to pay the principal of said bonds, which said money last mentioned the said defend-
30 ant still retains, and this the said defendant is ready to verify; wherefore he prays judgment, &c.

HAY, GREENE AND LITTLER,
*Att'ys for Plaintiff.*

3. And for a further replication to said defendant's said second plea the said plaintiff says precludi non, because he says that before the issue of said bonds the general assembly of the State of Illinois, by an act approved March 27th, 1869, entitled "An act to amend an act entitled an act to incorporate the Ottawa, Oswego and Fox River Valley Railroad Company," recognized the validity and force of the said act in said second plea mentioned, and by the second section of said act last mentioned full power and authority was conferred upon the defendant to issue and deliver the said bonds in said declaration mentioned; and plaintiff further avers that said Ottawa, Oswego and Fox River Valley Railroad was duly located and constructed through the said county of Kendall in pursuance of the terms of its charter and the act of March 27th, A. D. 1869; and this the said plaintiff prays may be enquired of by the court.

HAY, GREENE AND LITTLER,
*Att'ys for Plaintiff.*

31 4. And for a further replication to said defendant's second plea said plaintiff says precludi non, because he says that by a certain act of the general assembly of the State of Illinois, in force April 20, 1869, the said act in said second plea mentioned was amended, and the said act of February 18, 1857, mentioned in said second plea was thereby recognized as a law duly passed and in force; and this the said plaintiff prays may be enquired of by the court.

HAY, GREENE AND LITTLER,
*Att'ys for Pl'ff.*

5. And for a further replication to said defendant's said second plea said plaintiff says precludi non, because he says that by virtue of chapter eighty-six of the Revised Statutes of the State of Illinois, known as Gross Statutes, in force before and at the time of the issue and delivery of the bonds in said plaintiff's declaration mentioned, full power and authority was conferred upon the said defendant to issue and deliver the said bonds in said plaintiff's declaration mentioned; and this the said plaintiff prays may be enquired of by the court.

HAY, GREENE AND LITTLER,
*Att'ys for Pl'ff.*

32 On the same day, to wit, the 25th day of July, A. D. 1877, said defendant, by its attorney, filed in said clerk's office its demurrer to the replications of said plaintiff in said-entitled cause; which said demurrer is in the words and figures following, to wit:

*Demurrer to replications.*

UNITED STATES OF AMERICA,
*Northern District of Illinois:*

AUGUSTUS T. POST
*v.*
BOARD OF SUPERVISORS OF KENDALL COUNTY. } Debt. July term, A. D. 1877.

And the said defendant as to the second, third, fourth, and fifth and sixth replications of the said plaintiff by him filed says that the same and the matters therein contained in each and every of them in manner and form as therein set forth are not sufficient in law, and the said defendant is not obliged by law to answer the same or either of them or any part thereof, and this the defendant is ready to verify; wherefore it prays judgment, &c.

McREA, *Att'y for Def't.*

(Endorsed:) Filed July 25, 1877. Wm. H. Bradley, cl'k.

33 On the same day, to wit, the 25th day of July, A. D. 1877, in the July term of said court in the record of the proceedings thereof in said-entitled cause before the Hon. Thomas Drummond, judge, is the following entry, to wit:

AUGUSTUS T. POST
*v.*
THE BOARD OF SUPERVISORS OF KENDALL County.

Now come the parties, by their attorneys, and on motion of the defendant's attorney the demurrer of the plaintiff to the second plea herein is overruled, and on motion of the plaintiff, by his attorney, leave is given him to file five special replications to the said second plea; and thereupon the defendant, by its attorney, files its demurrer to said replications, and said demurrer of the defendant now coming on to be heard after hearing the arguments of counsel, the court sustains the demurrer of the defendant to the second, third, fourth, and fifth replications, and overrules the demurrer to the first replication, and the issue joined herein upon the first replication to the second plea of the defendant is, by agreement of the parties by their attorneys, submitted to the court, and after hearing a part of the evidence, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

34 Afterwards, to wit, on the 26th day of July, A. D. 1877, in the said July term of said court in the record of the proceedings thereof in said-entitled cause before the Hon. Thomas Drummond, judge, is the following entry, to wit:

AUGUSTUS T. POST
*v.*
THE BOARD OF SUPERVISORS OF KENDALL County.

Now come again the parties, by their attorneys, and after hearing additional evidence without concluding the same, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

Afterwards, to wit, on the 27th day of July, A. D. 1877, in the said July term of said court in the record of the proceedings thereof in said-entitled cause before the Hon. Thomas Drummond, judge, is the following entry, to wit:

AUGUSTUS T. POST
*v.*
THE BOARD OF SUPERVISORS OF KENDALL County.

Now come again the parties, by their attorneys, and after hearing additional evidence without concluding the same, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

35 Afterwards, to wit, on the 28th day of July, A. D. 1877, in the said July term of said court in the record of the proceedings thereof in said-entitled cause before the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

AUGUSTUS T. POST
*v.*
THE BOARD OF SUPERVISORS OF KENDALL County. } Assumpsit.

Now come again the parties, by their attorneys, and on motion of the plaintiff, by his attorney, leave is given him to file a sixth replication to the second plea herein, to which sixth replication the defendant, by its attorney, files its rejoinder, and the plaintiff files his demurrer to said rejoinder, and the demurrer of the plaintiff to said rejoinder now coming on to be heard, after hearing the arguments of counsel the court holds that said demurrer should be carried back to said sixth replication, and decides said sixth replication insufficient in law, and after hearing the concluding evidence and the arguments of counsel the court takes the same under advisement.

On the same day, to wit, the 28th day of July, A. D. 1877, the said plaintiff, by his attorneys, filed in said clerk's office his replication to the said second plea of said defendant in said-entitled cause; which said replication is in the words and figures following, to wit:

*Replication to second plea.*

6. And for a further replication to said second plea of the said
36 defendant said plaintiff says precludi non, because he says the said act of the general assembly of the State of Illinois in said plea mentioned was duly enrolled and signed by the president of said senate and the speaker of said house of representatives, and signed and approved by the governor of the State of Illinois, and deposited in the office of the secretary of state of the State of Illinois, in pursuance of the then constitution and laws of said State, and the said act was thereafter duly published under and by virtue of the authority of said State among and with the public laws of said State as a law in force February 18th, A. D. 1857; and the said plaintiff avers that the original journal of the senate and house of representatives of said session of the said legislature of the State of Illinois at which said act was

passed, kept by the secretary of the senate and the clerk of the house of representatives, respectively, and deposited by them in the office of the secretary of state of Illinois, to wit, at the said session of said legislature, held in the year A. D. 1857, have, since the adjournment of said session, been lost or destroyed, and the same cannot now be produced, and do not now remain in the office of the secretary of state of said State of Illinois, but that the said act so duly enrolled and
37 signed now remains in the office of the secretary of state of the State of Illinois, wherein the same was duly deposited in pursuance of the then constitution and laws of said State then in force; wherefore the said plaintiff says that the said act became and was a law of the State of Illinois on the day last mentioned, and ever since hath been and still is law in force in said State.

And this the said plaintiff prays may be inquired of by the court.

HAY, GREENE AND LITTLER,
*Att'ys for Plaintiff.*

(Endorsed:) Filed July 28, 1877. Wm. H. Bradley, cl'k.

And on the same day, to wit, the 28th day of July, A. D. 1877, said defendant, by its attorneys, filed in said clerk's office its rejoinder to the sixth replication of plaintiff to the second plea of said defendant in said-entitled cause; which said rejoinder is in the words and figures following, to wit:

*Rejoinder to sixth replication to second plea.*

Circuit court of United States, northern district of Illinois.

AUGUSTUS POST
*v.*
THE BOARD OF SUPERVISORS OF THE COUNTY of Kendall.

38 And for rejoinder to the sixth replication of plaintiff to the second plea in this case the defendant says that said bill was not enrolled by the senate or any officer thereof, and that the first drafts of the said journals called in said replications original journals were duly deposited in the office of the secretary of state, in pursuance of the statute, and were, in pursuance of the statute of Illinois, copied into a well-bound book, a record book, provided and kept for that purpose, in pursuance of statute, and that the contents of said (so called) original journals are still preserved in said record book now remaining in the office of the secretary of state, and this defendant is ready to verify, &c.

McRAE AND BARGE,
*Attorneys for Def't.*

(Endorsed:) Filed July 28, 1877. Wm. H. Bradley, cl'k.

Afterwards, to wit, on the 22d day of June, A. D. 1878, in the adjourned May term of said court in the record of the proceedings thereof in said-entitled cause before the Hon. John M. Harlan, one of the justices of the Supreme Court of the United States, and the Hon. Henry W. Blodgett, district judge, is the following enty, to wit:

39 AUGUSTUS T. POST
*v.*
THE BOARD OF SUPERVISORS OF KENDALL County.

By agreement of the parties, by their attorneys, it is ordered by the court that the submission of this cause to the court heretofore entered be set aside and vacated, and now on motion of the counsel for the plaintiff leave is given to file an additional replication to defendant's plea, with leave to the defendant to file a demurrer, if he shall so elect; and the hearing of this cause is postponed to the first day of October next, to which time it is set down.

On the same day, to wit, the 22d day of June, A. D. 1878, said plaintiff, by his attorneys, filed in said clerk's office his seventh and eighth replications to the second plea of said defendant in said-entitled cause; which said replications are in the words and figures following, to wit:

*Seventh and eighth replications to second plea.*

Circuit court of the United States, northern district of Illinois, May term, A. D. 1878.

AUGUSTUS T. POST
*v.*
THE BOARD OF SUPERVISORS OF KENDALL County, &c.

40 And for a further replication in this behalf to the said defendant's second plea (by leave, &c.) said plaintiff says precludi non because he says that E. Henderson, chairman of the board of supervisors of said county of Kendall, and Henry S. Hudson, county judge of said county of Kendall, on, to wit, the eighth day of November, A. D. 1870, made and signed their respective affidavits on which they each depend and certified under oath that the said bonds in said plaintiff's declaration mentioned were entitled to registry in the office of the auditor of public accounts of the State of Illinois, under and in pursuance of a certain public law of the State of Illinois then in force, entitled "An act to fund and provide for paying the railroad debts of counties, townships, cities, and towns," in force April 16, 1869, and which affidavits were on the 25th day of November, 1870, filed in the office of the said auditor of public accounts of the State of Illinois, in pusuance of the said act of the general assembly of the said State last mentioned. And the plaintiff further avers that the said E. Henderson and Henry S. Hudson were at the time of the making and filing of the said affidavits aforesaid respectively the chairman of the board of supervisors of the said county and county judge of said Kendall County.

41 And the plaintiff further avers that upon the filing of the said affidavit in the office of the said auditor of public accounts of the State of Illinois, the said bonds in said plaintiff's declaration mentioned were duly registered by said auditor of public accounts, and the said registering thereof was duly endorsed upon said bonds respectively by said auditor, to wit, on the 25th day of November, A. D. 1870, as required and provided in and by said act of the general assembly of the

State of Illinois last mentioned, and this the said plaintiff is ready to verify.

HAY, GREENE AND LITTLER,
*Att'ys for Plaintiff.*

8. And for a further replication to said second plea herein (by leave, &c.) said plaintiff says precludi non, because he says that he purchased the said bonds in said declaration mentioned, before the maturity thereof, for a valuable consideration, and without notice of any of the supposed defects and irregularities with reference to the issue of said bonds in said second plea set forth, and this the said plaintiff is ready to verify.

HAY, GREENE AND LITTLER,
*Att'ys for Plaintiff.*

(Endorsed:) Filed June 22, 1878. Wm. H. Bradley, cl'k.

42 Afterwards, to wit, on the 2d day of October, A. D. 1878, said defendant, by its attorney, filed in said clerk's office its demurrer to the seventh and eighth replications of the plaintiff to the second plea of the said defendant in said-entitled cause; which said demurrer is in the words and figures following, to wit:

*Demurrer to seventh and eighth replications.*

UNITED STATES OF AMERICA,
*Northern District of Illinois:*

AUGUSTUS T. POST
*v.*
BOARD OF SUPERVISORS OF KENDALL County. } July term, 1878.

And the said defendant as to the seventh and eighth replications of the said plaintiff, by him filed, says that the same, and the matters therein contained in each and every of them, in manner and form as therein set forth, are not sufficient in law, and the said defendant is not obliged by law to answer the same, or either of them or any part thereof, and this the defendant is ready to verify; whereof it prays judgment, &c.

McRAE, *Att'y for Def't.*

(Endorsed:) Filed Oct. 2, 1878. Wm. H. Bradley, cl'k.

43 On the same day, to wit, the 2d day of October, A D. 1878, in the July term of said court in the record of the proceedings thereof in said-entitled cause before the Hon. John M. Harlan, one of the justices of the Supreme Court of the United States, and the Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

AUGUSTUS T. POST
*v.*
THE BOARD OF SUPERVISORS OF KENDALL County.

Now come the parties, by their respective attorneys, and upon issue joined herein by agreement of the parties as per stipulation filed, they

waive the intervention of a jury, and for trial put themselves upon the court, and after hearing a part of the evidence, the hour of adjournment having arrived, the further trial of this cause is postponed until to-morrow morning.

Afterwards, to wit, on the 3rd day of October, A. D. 1878, in the said July term of said court in the record of the proceedings thereof in said-entitled cause before the Hon. John M. Harlan, one of the justices of the Supreme Court of the United States, and Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

AUGUSTUS T. POST
*v.*
44 THE BOARD OF SUPERVISORS OF KENDALL County.

Now come again the parties, by their respective attorneys, and after hearing the concluding evidence and a part of the arguments of counsel, the hour of adjournment having arrived, the further trial of the cause is postponed until to-morrow morning.

Afterwards, to wit, on the 4th day of October, A. D. 1878, in the said July term of said court in the record of the proceedings thereof in said-entitled cause before the Hon. John M. Harlan, one of the justices of the Supreme Court of the United States, and Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

AUGUSTUS POST
*v.*
THE BOARD OF SUPERVISORS OF KENDALL County.

Now come again the parties, by their respective attorneys, and after hearing the concluding arguments of counsel the court takes the same under advisement.

Afterwards, to wit, on the 30th day of July, A. D. 1879, in the said July term of said court in the record of the proceedings thereof in said-entitled cause before the Hon. John M. Harlan, one of the jus-
45 tices of the Supreme Court of the United States, and Hon. Henry W. Blodgett, district judge, is the following entry, to wit:

AUGUSTUS T. POST
*v.*
THE BOARD OF SUPERVISORS OF KENDALL County.

This cause having been heretofore submitted upon written stipulation of parties waiving the intervention of a jury, the court being now fully advised upon all the evidence herein, finds the issues for the defendant. It is thereupon considered and adjudged by the court that the defendant recover of the plaintiff its costs and charges in this behalf expended, taxed at the sum of thirty dollars, and that execution issue therefor; and it further appearing to the court that upon the trial of this cause the circuit justice and the district judge were divided in opinion as to the questions of law and fact upon which such division

arose, it is thereupon further ordered by the court that special findings and certificate of evidence herein be filed and entered at large upon the record herein and made a part of the record in this cause.

In the circuit court of the United States for the northern district of Illinois, July term, 1879.

AUGUSTUS T. POST
*v.*
46 KENDALL COUNTY.

This case having by the agreement in writing between the parties duly filed been submitted to the court for trial without the intervention of a jury, and it appearing to the court as to the questions of fact in the case that there is no contention between the parties to the suit except as to the existence or non-existence as a law in force of an act of the legislature of the State of Illinois, referred to in the recitals of the bonds in suit as the authority under which the same were issued, the same being entitled "An act authorizing certain cities, counties, incorporated towns, and townships to subscribe to the stock of certain railroads," approved February 18th, 1857, and the various statutes of the State of Illinois bearing upon the subject, in reference to which matter we find the following facts from the evidence in the case:

First. That on the 4th day of May, 1869, the chairman of the board of supervisors of Kendall County and the clerk of the county court of that county, acting in the name and in behalf of the said county of Kendall, and in pursuance of an election in said county of Kendall, held on the thirtieth of March, 1869, under the act recited on the face of
47 the bonds in suit, at which election, called by the clerk of the county court and not by the county court or board of supervisors, and upon only twenty days' notice, a majority of the legal voters of said county participating in the same, but not a majority of all the voters of said county, taking as a standard the number of votes thrown at the last general election for State and county officers previous to the vote thus had on the question of subscription, voted "for subscription," made, signed, and sealed with the seal of said county, and afterwards issued and delivered to the Ottawa, Oswego and Fox River Valley Railroad Company, by order of the board of supervisors, fifty bonds of the denomination of $1,000 each, and for which said bonds, if said act of February eighteenth, 1857, be valid, said county became entitled to shares of stock of the nominal value of $50,000 in said company, and that the thirteen bonds here in suit, and which were read in evidence, and are described in the declaration, are a portion of the instalment of said bonds first maturing; and that the plaintiff purchased said bonds for full value, paid therefor before their maturity, and without any actual notice of any alleged invalidity of said act under which they purported to have been issued.

48 Second. That the bonds in suit were duly registered in the office of the auditor of the State of Illinois on the twenty-fifth day of November, 1870, on the affidavits filed with said auditor by the then county judge and chairman of the board of supervisors of said county, stating that all the conditions precedent of the act of the general assembly of the State of Illinois, in force April sixteenth, 1869, entitled "An act to fund or provide for paying the railroad debts of counties, townships, cities, and towns," in relation to the registry of bonds in the State auditor's office, had been fully complied with, so as to en-

title said bonds to registration under the provisions of said act; and that the auditor's certificate of registration was endorsed on each of said bonds under his hand and official seal, which certificates were also read in evidence.

Third. That the interest on said bonds was collected and paid for three years next after the issue thereof, and that in 1871 the board of supervisors of said county ordered the levy and collection of a tax sufficient to pay one-third of the entire issue of said bonds, the bonds in suit being a part of the bonds for the payment of which said tax was ordered to be levied, which tax was in part collected, and is now in the hands of the treasurer of Kendall County, but the further collec-
49 tion of said taxes and the payment of the money so collected to the holders of said bonds was in 1871 enjoined by injunction issued from the circuit court of Kendall County, in the State of Illinois, in a suit to which the plaintiff was not a party.

Fourth. That the railroad company, by its attorney, after the service of their injunction and some time prior to the second day of October, 1872, issued and delivered to the clerk of the county court of Kendall County a certificate stating that said county was the owner of stock in said company to the amount of $50,000.00. But there is no evidence that said county ever subscribed for any of the stock of said company, upon any subscription book or paper, or otherwise, unless it be by the acts of its officers in issuing said bonds as aforesaid; and the evidence shows that the said board of supervisors of said county have never accepted said certificate of stock; that the said bonds, on being issued, were placed by the order of the board of supervisors of said county in the hands of a trustee, to be delivered to said railroad company as the work of said railroad should progress, and the same were from time to time delivered by said trustee to said company or its order in pursuance of the terms and conditions upon which they were deposited with said trustee; and said stock has never been canceled, nor the
50 certificate thereof tendered back to said railroad company.

That the railroad in aid of which said bonds were issued was constructed through Kendall County prior to the final delivery of said bonds, and now runs through said county, and from thence, hitherto, has been and is now in active operation, not by said railroad company, but by its lessee.

Fifth. That ever since the year 1857 there has been on file in the office of the secretary of state of the state of Illinois an enrolled law, bearing the title of the act referred to in said bonds, duly signed by the speakers of both houses of the general assembly of the State of Illinois for the year 1857, and approved by the governor of said State on the 18th day of February, 1857.

Sixth. That said enrolled law, so deposited in the office of said secretary of state, was also published with and among the public laws of said state passed by the legislature of said State in the year 1857, in a volume published in pursuance of the laws of said State, labeled "Laws of Illinois," at the end of which volume, in pursuance of a statute of that State approved fourteenth February, 1831, was a printed certificate of said secretary of state stating that the laws therein contained are true and perfect copies of the enrolled laws on file in his office.

51 Seventh. That at the session of the legislature of Illinois, which began fifth January, 1857, and ended at 7 a. m. on the nineteenth February of same year, the secretary of the senate, with the aid of his assistants, in accordance with the general usage before

and after that time, kept minutes of the proceedings of that body during each day as the business progressed, and, after the close of the session for the day, made up from the minutes of the journal of the proceedings for that day, on paper prepared for that purpose, fastening the whole together at the top, which journal so kept and made up was the full and complete journal of the proceedings of the senate for that day, and was the original journal of the senate, which the plaintiff claims it was the duty of the secretary of the senate, under the law then in force, to deposit, within ten days after the adjournment of the legislature, in the office of the secretary of state, and the journal which it was the duty of the secretary of state to cause to be copied into a "well-bound book," by such person as the secretary of state should contract with to do said copying under the provisions of sections two, three, and four of the act of the legislature of said state, entitled "An act to provide for copying and distributing the laws and journals, and for other purposes," approved twelfth February, 1849; that in pursuance of said law the secretary of state did provide the proper
52 books, and cause the said journal of the senate to be copied therein, and said books still remain in the office of the secretary of state of the State of Illinois. But the court further finds that the persons who so copied said journals of the senate and of the house of representatives for the year 1857 into said books were not charged by law with the duty of copying said journals in said books, and the court further finds that said copies were not compared with the original by the secretary of State, nor do they appear to have been compared by any sworn officers of the State except as herein stated.

The court further finds in this connection that John S. Roberts, who was in the winter of 1857 the principal enrolling and engrossing clerk of the senate, in conjunction with Mr. Higbee, an employé in the senate, either copied himself or superintended in a general way the copying of the journals for 1857. One Collard had the contract for such copying, and was under bonds to do the same. He failed to perform the contract. Roberts and Higbee applied to the secretary of state for permission to do the work; that officer replied that he didn't care who did the work; that he held Collard's sureties responsible, and that if the sureties did not object he would not. The sureties assented to Roberts and Higbee having charge of the copying, and they took charge thereof; the journals of the senate were handed to Messrs. Rob-
53 erts and Higbee by request of the secretary of state to be copied into the "well-bound book."

Eighth. That said books so purporting to be a copy of the journal of the senate for the year 1857, and made in pursuance of said act of twelfth February, 1849, show that on the 14th day of February, 1857, a message was received by the senate from the house of representatives stating that the house had passed a bill with the following title, to wit: "A bill for an act authorizing certain cities, counties, incorporated towns, and townships to subscribe to the stock of certain railroads," and requested the concurrence of the senate in the passage of said bill; that on the sixteenth day of February, 1857, the said bill was taken up by the senate, read the first time, ordered to a second reading, the rules suspended, and read a second time and referred to the committee on banks and corporations, and that said copy of said journal shows no other action of the senate in regard to said bill.

Ninth. That it also appears from a similar well-bound book, in like manner purporting to be a copy of the journal of the house of repre-

sentatives for the year 1857, that on the seventeenth day of February, 1857, a message was received by the house from the senate, through the assistant secretary of the senate, returning said bill to the house and informing the house that the senate had concurred with the
54 house in the passage of said bill; that on the same day the committee of the house on enrolled and engrossed bills reported said bill to the house as correctly enrolled; that said bill was afterwards duly signed by the speaker of the house and president of the senate, and duly laid before the governor for his approval, and on the eighteenth day of February, 1857, a message was received by the house from the governor informing the house that the governor had approved and signed said act, and the said act was thereupon duly deposited with and filed by the secretary of state in his office as a valid statute of the State of Illinois, and so remains there on file.

Tenth. That it also appears from the evidence in this case that the senate, on the sixteenth day of February, 1857, passed many bills, in the following manner, to wit:

Several bills, to the passage of which there was no objection from any member of the senate, were read and placed together in a bundle or package and but one call of the ayes and noes was had on the final vote on their passage; but it was the practice of the secretary of the senate, in making up the journal, to have the journal show that the ayes and noes were called on each bill separately; that it was the practice of the secretary and his assistants to make up a sheet showing the title of each bill, and the ayes and noes on its passage, with
55 appropriate entries on that sheet or on others attached thereto, showing in detail the action of the senate in the passage of such bills, which sheets should have been fastened together in their proper order, and thereby make up the journal of the senate, so far as it related to the passage of such bills.

Eleventh. That a part of said original journals, so kept and made up from day to day by the secretary of the senate, for said session of 1857, were delivered by the secretary of the senate directly to the public printer, to be printed before being delivered to the secretary of state, and the greater part thereof were delivered by the said secretary of the senate, upon the request of the secretary of state, directly to Mr. Roberts or to Mr. Higbee, and by the secretary of state, either before or after they had been copied into the "well-bound book," as stated, they were delivered to the public printer; that when said original journals were taken to the office of the public printer, they were there separated and the sheets distributed to compositors, for the purpose of being printed, and when printed returned to the office of the secretary of state; and if they had not previously been copied by the copyist into the "well-bound book" were then copied by him into said book, and after such copying and printing no care was taken to preserve such original journals, and the same are now lost; and that it never was the practice, until after 1872, to preserve the original journals of the legislature after they had been so as aforesaid copied
56 into books to be kept in the office of the secretary of state and so printed in the published journals.

And the court further finds that at the time of the adjournment sine die of said general assembly, on the morning of the nineteenth February, 1857, the proceedings in the senate of the sixteenth, seventeenth, eighteenth, and nineteenth days of February, 1857, had not been written out in full by the secretary of the senate, or by any one else, but were for the first time written out after the adjournment of the senate

and within ten days thereafter by the proper officers of the senate, and they were transcribed in said "well-bound book" before being sent or taken to the public printer.

Twelfth. That soon after the close of the session of the legislature for the year 1857 the journals of the house of representatives, and of the senate were published by the secretary of state, which journals as thus published, show the same proceedings in reference to said act in question as appear in the "well bound-book," and as are set forth in the certificate of the secretary of state, and none other.

The printing of the journals of that session was done under the official supervision of the secretary of state, and he caused the printed journals to be compared with the original cap-paper journals, with a view of having them correct.

57 It was his habit to compare the printed journals with the originals when he could conveniently do so, and when he could not, it was the duty of his assistants to do it. But the secretary of state could not remember whether the portion of the printed journal relating to the statute in question was compared with the original by himself or his assistants, and it does not appear who compared that particular portion of the journal.

Thirteenth. And we further find that the document offered in evidence by the defendant being a certificate of the secretary of state, under his hand and the great seal of state, purporting to contain a full and complete copy of all the entries in the original journals of the senate for the year 1857 of the proceedings had in said senate relating to the act in question was taken from said copy of the original journal, so appearing in said "well-bound books" now in the office of the secretary of state.

Fourteenth. And we further find that there is in the office of the secretary of state of the State of Illinois a series of books purporting to be and published as journals of the senate and house of representatives, labeled "Senate Journal of " (specifying the year), and "House Journal of ," as the sessions of the general assembly were from time to time held, from the year 1822 to the year 1874, of

58 which series the "well-bound book," above mentioned, and labeled "Senate Journal, 1857," is one. But the court further finds that all of said books in said series made prior to the adoption of the constitution of 1848, and to the passage of the law of twelfth February, 1849, in pursuance thereof, were in fact made by the secretary of the senate and the clerk of the house of representatives, and their respective assistants, as the original journals of said bodies respectively, or by the copyists appointed by the senate or house for that purpose, and by them deposited with the secretary of state as the original journals, and that all of said books in said series made after the adoption of the constitution of 1848, and the passage of the law of twelfth February, 1849, in pursuance thereof, are the works of the copyists, as hereinbefore stated, and that said entire series of books, by the usage of the respective secretaries of state, have always been treated as the official record of said journals respectively, and that, so far as the evidence shows, no other copies of such journals were ever preserved as official documents.

Fifteenth. That on the thirteenth day of July, A. D. 1877, the secretary of state of the State of Illinois made a certificate, and signed the same, and verified the same with the great seal of the State of Illinois, which certificate was produced in evidence to the court by

59 the defendant, and which certificate was and is as follows, to wit:

UNITED STATES OF AMERICA,
*State of Illinois, ss:*

OFFICE OF SECRETARY.

I, Geo. H. Harlow, secretary of state of the State of Illinois, do hereby certify that I am, as such secretary, the custodian of the original journals of the senate of the twentieth general assembly of the State of Illinois at its regular session begun and held at the city of Springfield January 5, 1857, and that said journals now remain in my office; and that upon examination of the same I find the following proceedings entered therein relating to a bill for "An act authorizing certain cities, counties, incorporated towns, and townships to subscribe to the stock of certain railroads," to wit:

*Journal of the senate.*

SATURDAY, *February* 14, 1857.

A message from the house of representatives by Mr. Boal, a member:

Mr. PRESIDENT: I am directed to inform the senate that the house of representatives has passed bills of the following titles, to wit: * * * A bill for "An act authorizing certain cities, counties, incorporated towns, and townships to subscribe to the stock of certain railroads," in the passage of which I am instructed to ask the concurrence of the senate. * * *

MONDAY, *February* 16, 1857—7 o'clock p. m.

60 House bill for "An act authorizing certain cities, counties, incorporated towns, and townships to subscribe to the stock of certain railroads," coming up, was read a first time and ordered to a second reading. On motion of Mr. Fuller the rule was suspended, the bill read a second time by its title, and referred to the committee on banks and corporations.

And I do further certify that the foregoing extracts are a full and complete copy of all the entries upon said journal of proceedings had relating to said bill or having any relation to a bill for an act with such title.

In witness whereof I hereto set my hand and affix the great seal of the State, at the city of Springfield, this 13th day of July, A. D. 1877.

{ THE GREAT SEAL OF THE STATE OF ILLINOIS. }

GEO. H. HARLOW,
*Secretary of State.*

Sixteenth. And we further find that the following is a true copy of a stipulation of the defendant offered in evidence by the plaintiff at the trial of this cause:

*Stipulation.*

It is hereby stipulated that the certified transcript presented by the defendant of the proceedings in the senate was taken from the "well-bound book" in the office of the secretary of state, sometimes called the journal record, and marked "Senate Journal of 1857," being
61 the same book mentioned in the opinion of the supreme court of Illinois in the case of Miller et al. v. Goodwin, reported in 70 Ill.

Rep., 659, and that the journal of the senate proceedings of that session prepared by the secretary of the senate and under the direction of the senate, and deposited with the secretary of state in parcels of folio paper, were lost before the year 1871; and, also, that there is not attached to said record journal or "well-bound book" any certificate by any officer or person that the same or any part thereof was ever compared with the journal as originally prepared by the secretary of the senate as aforesaid, or that said book or any part thereof is a true copy therefrom.

D. K. McRAE,
*Att'y for Def't.*

And the said cause having been heard before the undersigned, John M. Harlan, circuit justice, and Henry W. Blodgett, district judge, holding the said circuit court, and we, the said judges holding said court, having found and agreed upon the foregoing facts, were opposed in opinion—

1st. As to whether the act of February 18, 1857, was or ever became a valid statute of Illinois; and

2nd. As to whether the said plaintiff upon said facts was entitled by law to recover in said action.

Wherefore we certify the said facts and the said division of opinion to the supreme court for its determination.

62 And the said John M. Harlan, the presiding justice, being of the opinion that upon the foregoing facts the law of the case upon both of said questions is for the defendant, judgment is hereby entered for the defendant, and this certificate of division is ordered to be entered of record.

JOHN M. HARLAN, [SEAL.]
*Circuit Justice.*
H. W. BLODGETT, [SEAL.]
*Dist. Judge.*

(Endorsed:) Filed July 30, 1879. Wm. H. Bradley, cl'k.

On the same day, to wit, the 30th day of July, A. D. 1879, on the trial of said cause, the following exceptions were taken by the said plaintiff and allowed by the court, and made of record in said-entitled cause, to wit:

*Plaintiff's bill of exceptions.*

In the circuit court of the United States for the northern district of Illinois.

AUGUSTUS T. POST }
*vs.* }
KENDALL COUNTY. }

Be it remembered that upon the trial of this cause before the court, without the intervention of a jury, the counsel for defendant, to maintain the issues on his part, offered in evidence a certificate of the
63 secretary of state of the State of Illinois made and signed by said secretary of state in the year 1877 and verified by the great seal of state, certifying that such secretary was at the time of making such certificate the custodian of the original journals of the general

assembly of said State at its session which commenced the 5th of January, 1857; that the said journals were then in his office; that the said certificate purported to contain a full and complete copy of all the entries in said original journal of the proceedings had in the senate at that session having any relation to the passage of the act of the legislature referred to in the bonds offered in evidence by the plaintiff, and which certificate showed the following and no other proceedings, to wit:

*Senate Journal.*

12TH FEBRUARY, 1857.

A message from the house of representatives by Mr. Bond, a member:

Mr. PRESIDENT: I am directed to inform the senate that the house of representatives has passed bills of the following titles, to wit:

"An act authorizing certain cities, counties, incorporated towns, and townships to subscribe to the stock of certain railroads."

16TH FEBRUARY, 1857.

House bill for an act (the same title as above) coming up, was read a first time and ordered to a second reading. On motion of Mr.
64 Fuller the rule was suspended, the bill read a second time by its title, and referred to the committee on banks and corporations.

The defendant further offered in evidence the printed copy of the journal of the senate of said year (session), published by the secretary of state, for the purpose of showing that the only proceedings had in relation to the act in question by the senate are those recited and set forth in said certificate by the secretary of state.

The plaintiff's counsel then and there (at the time same was offered) objected to the introduction of said certificate of said secretary of state as evidence, because—

1st. It is not true in fact that the said secretary of state was at the time of making the same the custodian of the original journals of the senate of the session aforesaid; nor was it true that the same (said original journals) were then (at the time of giving said certificate) in his office; nor was it true that the said certificate was made or transcribed from any original journal of the senate, or from any book or paper which itself, if present in court, would be evidence;

2nd. Because it is not competent to impeach an enrolled law by the certificate of the secretary of state; and

3rd. Because the defendant is estopped from proving, as against the plaintiff, an innocent holder of the bonds in suit, that the
65 act recited on the face of the bonds was not passed in due form as required by the constitution of Illinois.

The plaintiff's counsel further objected to the introduction of the printed copy of said journal as evidence because it is incompetent as evidence, has never been declared or held by the legislature or courts as evidence, and because the supreme court of Illinois has declared that it is not evidence of the contents of the original journal.

Whereupon, and in connection with said objections, the plaintiff's counsel offered in evidence the following stipulation of the defendant's counsel, to wit:

"It is hereby stipulated that the certified transcript presented by the defendant of the proceedings in the senate was taken from the 'well

bound book' in the office of the secretary of state, sometimes called the 'journal record,' and marked 'Senate Journal of 1857,' being the same book mentioned in the opinion of the supreme court of Illinois in the case of Miller et al. vs. Goodwin, reported in 70th Ill. Rep'ts, p. 659, and that the journal of the senate proceedings of that session prepared by the secretary of the senate, and under the direction of the senate, and deposited with the secretary of state in parcels of folio paper, were lost before the year 1871; and also that there is not attached to said record journal, or 'well-bound book,' any certificate, by any officer or person, that the same or any part thereof were ever compared with the journal as originally prepared by the secretary of the senate as aforesaid, or that said book, or any part thereof, is a true copy therefrom.

66

(Signed) "D. K. McRAE.
"*Att'y for Def't.*"

The court then overruled the objection of the plaintiff's attorney to the admission in evidence of the said certificate of said secretary of state, and of the said printed copy of the journal of the senate, and admitted the same and both thereof in evidence, leaving their effect, the principles of law to be deduced therefrom, and how far they are to control, an open question, to be determined upon the whole evidence in the case.

To which ruling of the court the plaintiff's counsel then and there excepted, and the court allowed the said exceptions; and because none of said matters otherwise appear, the plaintiff prayed that these exceptions might be signed and sealed and made a part of the record in the cause, and it is done accordingly.

JOHN M. HARLAN, [SEAL.]
*Circuit Justice.*
H. W. BLODGETT, [SEAL.]
*Judge.*

67 (Endorsed:) Filed July 30, 1879. Wm. H. Bradley, clerk.

On the same day, to wit, the 30th day of July, A. D. 1879, on the trial of said cause, the following exceptions were taken by the said defendant and allowed by the court and made of record in said-entitled cause, to wit:

POST
*v.*
KENDALL COUNTY.

*Bill of exceptions.*

Be it remembered that upon a trial of this case the plaintiff produced and offered to read in evidence the bonds which are set out verbatim in the first thirteen counts of the declaration.

It was admitted by the defendant that William Reddick and Benjamin M. Armstrong, whose signatures are attached to the bonds, were respectively supervisor and town clerk of the town of Ottawa at the time of signing the same, and that their signatures to the bonds produced are genuine.

Thereupon defendant objected to the bonds being read in evidence, upon the following grounds:

First. That there was no statute of the State of Illinois authorizing the issue of such bonds.

68 And defendant offered to prove and show to the court that the supposed act of February 18, 1857, mentioned in the recital of said bonds, was never passed by the senate of the general assembly of the State of Illinois, and that no vote was taken on the passage of the same by ayes and nays, and entered upon the journals as required by the constitution.

The defendant also offered to prove that the election upon which said bonds were founded was not held under or in compliance with the act of 1849, authorizing counties under certain circumstances to subscribe to the stock of railroad companies and issue bonds therefor, in this, that such election was called by the clerk of the county court, and not by the board of supervisors or the county court; and in this, that but twenty days' notice of said election was given, and not thirty days as required by that act; and in this, that said election while a majority of the legal voters participating in the election did vote in favor of the issues of such bonds, yet a majority of all the voters in said county, according to the standard provided for in the act of 1849, did not vote in favor of the same, and that the court ought to take judicial notice that the supposed act of February 18, 1857, was not valid.

69 Second. That the bonds upon their face were payable to the Ottawa, Oswego and Fox River Valley Railroad Company, or bearer thereof; and that by the laws of Illinois such bonds were not transferable without an endorsement in writing on the back of the bonds by the payee assigning the same to the purchaser.

It was admitted by the defendant that plaintiff had bought the bonds before the commencement of this action.

The court refused to hear the proof offered by the defendant in this regard at that stage of the trial, and no other evidence being offered in support of the bonds the court overruled the objections of the defendant and permitted the bonds to be read in evidence, which was done, and to each of these rulings of the court the defendant excepted at the time when the same were made.

After the bonds were read in evidence defendant put in evidence the printed journals of the senate of the general assembly of the State of Illinois at the session of the general assembly begun on the 5th day of February, A. D. 1857, and which closed February 18th, 1857, by which it appeared that the supposed act of February 18, 1857, was not passed by the senate; that is, it appeared from the printed journal aforesaid that no entry was made upon the journal of the passage of such

70 act by ayes and noes or otherwise.

The defendant also read in evidence the certificate of the secretary of state, a copy of which is set out in the findings in this case on page 59 of this transcript.

After said transcript so authenticated by the secretary of state under the seal of State was read in evidence, plaintiff offered to prove by the testimony of witnesses that the said certificate of the secretary of state as to the journal of the senate was not transcribed from the original journal of the senate made by the secretary of the senate, or his clerks, upon cap-paper, but was transcribed from the "well-bound book" in the office of the secretary of state, being the "well-bound book" spoken of in the opinion of the supreme court of Illinois in the case of Miller et al. vs. Goodwin, 70 Ill., 659.

To this testimony the defendants objected when it was offered, and insisted that the statements of the certificate authenticated under the

seal of state could not be contradicted by parol, and that it was not competent to prove that the book or books from which the extracts in that certificate were transcribed were not the original journals as declared in the certificate; but the court overruled said objection and admitted testimony tending to impeach the verity of that certificate; to which ruling of the court the defendant then and there excepted.

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The plaintiff also on the trial offered in evidence the testimony of certain witnesses tending to show that the act in question (of February 18, 1857) was passed as the constitution required; and that the transcript in the "well-bound book" or journal record spoken of was or might be defective in not being a true transcript of the first draft of the journal as prepared by the secretary of the senate, and in not containing a true and full account of the proceedings of the senate in reference to the question of the passage of that bill.

To the introduction of this testimony the defendant objected as incompetent to impeach the certificate of the secretary of state, or the character of the "well-bound book." But the objection was overruled by the court and the testimony admitted to be considered with other evidence in the case. To the ruling of the court the defendant excepted when the same was made.

Be it also remembered that on the trial of this cause plaintiff offered to read in evidence the certificate endorsed upon the back of each of the bonds mentioned, which certificate was dated "Auditor's office, Springfield, August 17, 1869," signed "C. E. Lippincott, auditor, P. A;" by which he certified that the within bond has been registered in this office this day, pursuant to the provisions of the act entitled "An act to fund and provide for paying the railroad debts of counties, townships, cities, and towns," in force April 16, 1869.

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To the reading of which certificate in evidence defendant objected on the ground that it was not competent evidence. But the court overruled the motion and permitted the same to be read in evidence.

Plaintiff also offered to read in evidence certified copies of affidavits purporting to have been made by certain officers of the county of Kendall, and filed in the office of the auditor at Springfield, Illinois, one of which is as follows:

STATE OF ILLINOIS,
*County of Kendall:*

YORKVILLE, *Nov. 8th*, 1870.

To the auditor of public accounts of the State of Illinois:

SIR: I hereby certify that the following-described bonds are entitled to registration in your office under the provisions of the act entitled "An act to fund and provide for paying the railroad debts of counties, townships, cities, and towns," in force April 16th, 1869; the bonds being numbered from No. one to No. eighteen incl., for $1,000 each, dated 18 , and payable July 1, 1872; from No. nineteeen to No. thirty-four, incl., for $1,000 each, dated 18 , and payable July 1, 1873; from No. thirty-five to No. fifty, incl., for $1,000 each, dated 18 , and payable July 1, 1874, being in all fifty bonds, and amounting to $50,000.00, and bearing interest at the rate of ten per cent. per annum, payable annually on the first day of July in each year. These bonds are issued by the county of Kendall, State of Illinois, to the Ottawa, Oswego, and Fox River Valley Railroad Company,

18

73

under and by authority of the provisions of "An act authorizing certain cities, counties, incorporated towns and townhips, to subscribe to the stock of certain railroads," approved Feb. 18, 1857, and by a vote of the people of said county at an election held on the 30th day of March, 1869; and I, as county judge of said county, do hereby certify that all the preliminary conditions in the act in force April 16, 1869, required to be done to authorize the registration of these bonds and to entitle them to the benefits of said act last referred to, have been fully complied with, to the best of my knowledge and belief.

HENRY S. HUDSON,
*County Judge, Kendall Co., Ill's.*

Subscribed and sworn to by the said Henry S. Hudson, before me, this 10th day of November, A. D. 1870.

JEREMIAH EVARTS,
*County Clerk, Kendall Co., Ill's.*

74 AUDITOR'S OFFICE, ILLINOIS,
*Springfield, June 15th,* 1878.

I, Thomas B. Needles, auditor of public accounts of the State of Illinois, do hereby certify that the foregoing and annexed instrument is a true, full, and correct copy of certificate of E. Henderson, chairman board of supervisors of Kendall Co., Ill's, certifying for registration the bonds issued for stock of O. O. and Fox River Valley R. R., under act of 1869, now on file in and forming part of the records of this office.

In testimony whereof I hereunto subscribe my name and affix the seal of my office, at Springfield, the day and year first above written.

{ AUDITOR'S OFFICE SEAL, ILLINOIS. }

T. B. NEEDLES.

(Endorsed:) Filed Nov. 25, 1870. C. E. Lippincott, auditor public accounts.

To the reading of which the defendant objected upon the ground that the original affidavits were not competent evidence for any purpose whatever, and that certified copies are not competent proof of the contents. But the court overruled the objection and permitted said certified copies of affidavits to be used in evidence in the cause, which was done. To which ruling of the court the defendant then and there excepted.

75 Plaintiff also offered to prove that a tax was levied by the officers of Kendall County, and collected in the years 1870 and 1871, for the purpose of paying the interest for those years upon bonds of which those mentioned in the declaration form a part; and that such interest was collected and actually paid by the officers of Kendall County; and that a tax was levied and in process of collection to pay the principal of these bonds and the interest thereon falling due in 1872.

To the introduction of evidence tending to prove these allegations defendant objected, but the court overruled the objection and permitted the evidence to be given in the case; to which ruling of the court the defendant then and there excepted.

And, also, on the trial of said issues plaintiff offered parol testimony to prove that the supposed act of February 18, 1857, was on file in the office of the secretary of state as an enrolled law in the year 1857, and from that time hitherto to this evidence defendant objected when the same was offered; but the court overruled the objection and admitted such proof, and to this ruling defendant then and there excepted.

And, also, on the trial plaintiff offered in evidence the testimony of witnesses to prove the mode in which the journal of the senate for the session begun January 5th, 1857, was made, and the mode in
76 which the record of the journal was made, and as to whether the manual labor of writing up the record was done by sworn officers, and tending to prove that they were not sworn. To every part of the above testimony defendant objected when the same was offered, but the court overruled the objections and the testimony was admitted by the court, and to this ruling the defendant excepted when the same was made.

And the plaintiff offered evidence tending to prove that the record of the journal of the senate found in the "well-bound book" remaining with the secretary of state was not compared by the secretary of state in person with the original draft of the journal prepared by the secretary or journalist of the senate; to which testimony defendant objected as incompetent when the same was offered, but the court overruled the objection and received the testimony, and to this ruling defendant then and there excepted.

And on this trial the court permitted plaintiff, against the objection of defendant, to introduce the testimony of Roberts tending to prove that the persons who superintended the copying of the journal in question into the journal record were not the same person or persons with whom the secretary had contracted to do this work, but that the work was done by other persons with the sanction of the secretary
77 of state, and with the acquiescence of the secretary of the senate, and to this ruling of the court defendant then and there excepted.

And on the trial plaintiff was permitted by the court, against the objection of defendant, to give in evidence the testimony of a witness tending to prove that many bills were passed on the sixteenth of February, 1857, by the senate in a peculiar mode (commonly called an omnibus), by calling the ayes and noes but once upon the passage of many bills; to this defendants objected as immaterial and as incompetent when the same was offered, but the court overruled the objection, and defendant then and there excepted, and under the ruling the testimony was received.

And defendant asks that this bill of exception be signed and sealed and made a part of the record, which is done upon the trial.

JOHN M. HARLAN, [SEAL.]
*Circuit Justice.*
H. W. BLODGETT, [SEAL.]
*Dist. Judge.*

(Endorsed:) Filed July 30, 1879. Wm. H. Bradley, cl'k.

And afterwards, to wit, on the 20th day of August, A. D. 1879, said plaintiff, by his attorneys, filed in said clerk's office his bond
78 in said-entitled cause; which said bond is in the words and figures following, to wit:

*Bond.*

Know all men by these presents that we, Augustus T. Post, of the city of New York, in the State of New York, as principal, and Frank W. Tracy, of the city of Springfield, of the State of Illinois, as surety, are held and firmly bound unto the Board of Supervisors of Kendall County, in the State of Illinois, in the sum of one thousand dollars, to

be paid to the said The Board of Supervisors of Kendall County, in the State of Illinois, or its assigns, to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this fifteenth day of August, A. D. 1879.

Whereas lately at a term of the circuit court of the United States in and for the northern district of Illinois, held at Chicago, in a suit depending in said court between the said Augustus T. Post, as plaintiff, and the said The Board of Supervisors of Kendall County, in the State of Illinois, as defendant, a judgment was rendered against the said plaintiff; and the said plaintiff having prayed for a writ of error to review said proceedings in the Supreme Court of the United States,
79 and having obtained a writ of error and filed a copy thereof in the clerk's office of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the board of supervisors of Kendall County, in the State of Illinois aforesaid, citing and admonishing it to be and appear at the term of the Supreme Court of the United States to be held at Washington on the second Monday of October, A. D. 1879:

Now the condition of the above obligation is such that if the said Augustus T. Post shall prosecute his said writ of error to effect, and answer all costs and damages if he shall fail to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

AUGUSTUS T. POST. [SEAL.]
FRANK W. TRACY. [SEAL.]

Sealed and delivered in presence of witness.
E. D. SHEPARD.

I hereby certify that I am personally acquainted with the financial circumstances of Frank W. Tracy, whose genuine signature appears to this bond as surety, and that he is abundantly good for a much larger sum than the penalty of this bond, and I would have no hesitation in accepting this bond if filed in my office.

80 Given under my hand and official seal, at Springfield, in said district, this 10th August, 1879.

[SEAL.] J. A. JONES, *Clerk.*

(Endorsed:) Filed August 20, 1879. Wm. H. Bradley, clerk.

81 NORTHERN DISTRICT OF ILLINOIS, *set:*

I, William H. Bradley, clerk of the circuit court of the United States for said district, do hereby certify the above and foregoing to be a correct and complete transcript of the record of all the proceedings had in said court in the cause wherein Augustus T. Post is the plaintiff and The Board of Supervisors of Kendall County is the defendant, as the same appears from the files and records of said court now remaining in my custody and control.

In testimony whereof I have hereunto set my hand and affixed the seal of said court, at my office in Chicago, in said district, this 26th day of August, A. D. 1879, and of our Independence the one hundred and fourth year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

82 UNITED STATES OF AMERICA,
*Northern District of Illinois, ss:*

The United States of America to the judges of the circuit court of the United States for the northern district of Illinois, greeting:

Because in the record and proceedings, as also in the rendition of a judgment of a plea which is before you in said circuit court between Augustus T. Post, plaintiff, and The Board of Supervisors of Kendall County, defendant, in an action of assumpsit, a manifest error hath happened, to the great damage of the said Augustus T. Post, as by his complaint appears, and it is being fit that the error, if any there has been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, you are hereby commanded, if judgment be given therein, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the second Monday of October, A. D. 1879, in the Supreme Court to be then and there held that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the law and custom of the United States should be done.

Witness the Hon. Morrison R. Waite, Chief Justice of the Supreme Court of the United States, this thirtieth day of July, in the year of our Lord one thousand eight hundred and seventy-nine, and of the Independence of the United States the 104th year.

[SEAL.] WM. H. BRADLEY, *Clerk.*

(Indorsed:) Supreme Court of the United States.
vs. . Writ of error.

83 UNITED STATES OF AMERICA,
*Northern District of Illinois, ss:*

To the Board of Supervisors of Kendall County, greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States to be holden at Washington on the second Monday of October, A. D. 1879, pursuant to a writ of error filed in the clerk's office of the circuit court of the United States for the northern district of Illinois, wherein Augustus T. Post is the plaintiff in error and The Board of Supervisors of Kendall County is the defendant in error, to show cause, if any there be, why the error mentioned should not be corrected, and speedy justice should not be done to the parties in that behalf.

Witness the Hon. Henry W. Blodgett this tenth day of September, in the year of our Lord one thousand eight hundred and seventy-nine.

H. W. BLODGETT, *Judge.*

84 (Indorsed:) Supreme Court of the United States. A. T. Post vs. Board of Supervisors of Kendall County. Citation. To October term, A. D. 1879.

Service accepted.

P. PHILLIPS,
*For Def't in Error.*

(Indorsement on cover:) No. 249. Augustus T. Post, plaintiff in error, vs. The Board of Supervisors of Kendall County. N. Illinois C. C. U. S. Filed 18th September, 1879.

REC. 249—4

SUPREME COURT U.S.
FILED
JAN 6 1882

IN THE

# SUPREME COURT OF THE UNITED STATES,

## OCTOBER TERM, A. D. 1881.

THE AMOSKEAG NATIONAL BANK,
*Plaintiff in Error,*

*vs.*

THE TOWN OF OTTAWA,
*Defendant in Error.*

No. 235.

# BRIEF FOR PLAINTIFF,

BY

**SANFORD B. PERRY.**

Beach, Barnard & Co., Legal Printers, 104 Randolph Street, Chicago.

IN THE

# SUPREME COURT OF THE UNITED STATES,

## OCTOBER TERM, A. D. 1881.

THE AMOSKEAG NATIONAL BANK,
*Plaintiff in Error,*

*vs.*

THE TOWN OF OTTAWA,
*Defendant in Error.*

No. 235.

# BRIEF FOR PLAINTIFF.

### The Cases,

*Town of South Ottawa* v. *Perkins*, and *Supervisors of Kendall Co.* v. *Post*, reported in 94 U. S. Rep., 260, were remanded to the court below, with directions to award, in each case, a *venire facias de novo.*

The law, giving this court jurisdiction to re-examine the final judgments of the Circuit Courts, having been amended so as to give jurisdiction only in cases where the amount in dispute exceeds the sum of five thousand dollars, the case first above mentioned could not again be brought here for consideration. The case of *Amoskeag National Bank* v. *The Town of Ottawa*, was, by the consent of all the parties to this litigation, selected for trial, in the place of the Perkins case.

## Plaintiff's Assignment of Errors.

1. The Circuit Court erred in admitting testimony on behalf of the defendant and against the objections of the plaintiff.

2. The said court erred in giving judgment for the defendant.

3. The said court erred in not finding the issues, and entering judgment, for the plaintiff.

4. The judgment of said court is manifestly against the findings of the court, and the facts of the case.

## The Contention.

The only question to be examined and decided, is, as to the existence or non-existence, as a valid law, of the supposed act of the legislature of the State of Illinois, entitled, "An Act authorizing certain cities, counties, incorporated towns and townships to subscribe to the stock of certain railroads," approved 18th February, 1857, published with and among the public laws of said State, passed by the legislature of said State in the year 1857, in a volume published in pursuance of the laws of said State, labeled "Laws of Illinois, 1857," at the end of which volume, in pursuance of a statute of that State then in force, was a printed certificate of the Secretary of State for Illinois, stating that the laws therein contained are true and perfect copies of the enrolled laws on file in his office.

## Compilation of the Laws relating to the Journals of the General Assembly of Illinois.

*Constitution of 1818, Art. 2, Sec. 8:*

Each house shall keep a journal of its proceedings, which shall be published.

This provision is contained in the constitutions of 1848 and 1870.

*Act of 14th January, 1827:*

There shall be printed, at the close of each session of the General Assembly, five hundred copies of the *Journals of each house;* for the printing, folding and stitching of which the *General Assembly shall contract.*

Rev. Laws of 1833, p. 424.

*Act of 14th Feb., 1831:*

§ 3. The Secretary of State is hereby authorized and required to cause to be made out, true and accurate copies of all laws, acts and resolutions of the General Assembly,

which may be ordered by the said General Assembly to be printed; and such copies so made out he shall deliver to the person authorized to print the same. And the Secretary of State shall likewise superintend the printing of such laws, acts and resolutions, carefully comparing the printed copies with the original laws and rolls deposited in his office, correcting all errors that may appear in such printed copies; and shall make and cause to be printed, at the end of such printed copy * * his certificate that the acts and resolutions so printed are exact copies of the rolls in his office.

*Act of 24th January, 1835:*

§ 1. All laws, journals, &c., &c., shall be given to the public printer hereafter to be elected by the joint ballot of the two houses of the legislature.

§ 4. Printed copies of the journals shall be furnished within twelve days after the adjournment of the legislature; *provided*, that the *clerks* of the *two houses shall have furnished the public printer, every morning, with the proceedings of the preceding day.*

§ 6. That it shall be the duty of the Secretary of State to *examine the printing of all laws, and see that they are correctly done.*

Statute Laws of 1839, p. 549.

*Act of 16th of January, 1836:*

Chap. 96, Rev. Stat. of 1845 (continued from Rev. of 1833):

"Sec. 7. All public acts, laws and resolutions, that have been, or shall be, passed by the General Assembly of this State, shall be carefully deposited in the office of the Secretary of State; and the Secretary of State is hereby charged with the safe keeping of said office, *and all laws, acts, resolutions and records deposited, or which shall hereafter be deposited therein.*"

This was a provision of the Rev. Laws of 1833, and has been continued in all revisions of the Statutes to the present time. (See Rev. Laws of 1874, Chap. 124, Sec. 3.)

*Re-enacted* as § 3 of Ch. 84, in "An act for revising "and consolidating the several statutes of the State of "Illinois," approved March 3, 1845, known as Rev. Stat. of 1845.

*Constitution of 1848, Art. 3, § 39:*

The General Assembly shall provide by law that the * * * *copying, printing*, binding and distributing the laws and journals shall *be let by contract to the lowest responsible bidder.*

*Act of 12th February, 1849*, entitled, "*An act to provide "for copying and distributing the laws and journals, "and for other purposes*":

§ 3. Within thirty days previous to the meeting of the General Assembly, the Secretary of State shall cause an advertisement to be published * * * inviting proposals for *copying* the laws, joint resolutions and journals of the General Assembly.

§ 2. The Secretary of State shall give the contract to the lowest competent responsible bidder.

§ 4. The Secretary of State shall be required to furnish a well-bound book, in which the journals shall be *copied.*

2 Scates' Stat., 734.

*Act of 25th Feb'y, 1867:*

§ 1. All the public *laws* of the State of Illinois, to be published hereafter, shall be duly certified to by the Secretary of State as correct copies of said laws as enrolled in the office of said Secretary of State, which certificate shall be published with the same, and *without such certificate no publication shall be received as evidence of the existence of such laws in any court of law or equity in this State.*

Gross' Stat., Ed. of 1869, Ch. 62, § 12.

Rev. Stat. of 1874, Ch. 124, § 7.

*Act of 9th March, 1869:*

§ 1. Copies of all bonds, papers, writings, and documents, *legally deposited* in the office of the Secretary of State, when certified by the Secretary of State, and au-

thenticated by the seal of his office, shall be received in the same manner and with like effect *as the originals.*

1 Gross' Stat., Ed. of 1869, Ch. 96, § 9.

*Act of 20th March, 1869:*

§ 1. The *copying* of the laws, *journals*, &c., of each General Assembly, shall be done under the personal supervision of the Secretary of State, and such *copies* shall be *carefully compared with the originals* in his office before being printed, and in no case shall he permit the originals to be taken out of his office.

1 Gross' Stat., Ed. of 1869, Ch. 62, § 13.

*Act of 29th April, 1873:*

§ 1. Provides for advertising for proposals for copying laws, journals, &c.

The contract to be awarded to the lowest responsible bidder, &c.

§ 3. The copying of all laws and journals shall be done in the State house, under the *personal supervision of the Secretary of State*, and such copies shall be *carefully compared with the original in his office*, before being printed.

§ 8. The *original journals* which may be prepared by the *Secretary of the Senate* and the *Clerk of the House of Representatives*, shall be securely bound in books and filed in the office of the Secretary of State.

§ 9. There shall be copied for the use of the public printer, one copy of the journals of each house.

Statutes of 1873 by Gross, p. 67.

*Rev. Stat. of 1874, Ch. 124:*

§ 8. In the publication of the laws of this State, or the resolutions, or *journals of the General Assembly*, the Secretary of State shall cause to be published, in each volume, a *general certificate* to the effect that the same as contained in such volume are *true copies* of the laws, resolutions or journals of the General Assembly, as the case may be, on file in his office; and each volume, *so certified*, shall be received as evidence in all courts and places.

*Revised Statutes of 1845, Ch. 62 p. 338*:

§ 5. It shall be the duty of the Governor of this State, so soon as the acts of the General Assembly of this State, after each and every session thereof shall have been published, to transmit, free of postage, to the executive of each State and Territory of the United States, * * * three copies of the acts of the General Assembly of Illinois, at such session, &c.

*3 Vol. Gross' Stat. of Illinois of 1873-74, pp. 333 and 335:*

"An act to repeal certain acts therein named," approved 31 March, 1874.

§ 1. The following acts and parts of acts are hereby repealed:

"An act to provide for copying and distributing the laws and journals, and for other purposes," approved February 12, 1849.

"An act for revising and consolidating the general statutes of the State of Illinois," approved March 3, 1845.

## I.

**The case, as made in the Town of South Ottawa v. Perkins, compared with the case, as made by the findings in the record now before the Court.**

*Perkins Case.*—That was a suit on bonds, issued under the act in question.

Turning to the record in that case, it appears that the counsel for the defendant offered in evidence two printed volumes, purporting to be the printed journals of the legislature of Illinois, for the year 1857, one of the Senate and the other of the House, for the purpose of show-

ing that the act in question was not constitutionally passed.

The counsel for the town further offered in evidence for the same purpose, a certified transcript, purporting to be made from the journals of the legislature of 1857, showing the same alleged facts, sought to be shown by the printed volumes; the certificate of the Secretary of State thereto, bearing date the 6th day of December, 1872.

The counsel for the plaintiff objected to the introduction of all said evidence, on two grounds: (1) That it was not competent evidence to prove what proceedings were had by the legislature in reference to said act, and (2) that the plaintiff's rights as a *bona fide* holder of the bonds, for value, could not be assailed by proving that the bill was not constitutionally passed; claiming that the plaintiff had a right to rely on the *printed* statutes, and was not obliged to look further.

After the counsel for the defendant had finished his offers of proof, as above stated, the plaintiff's counsel offered to show that the journals from which said transcript purported to be taken, were not the *original* journals, nor *copies* from the same.

It appearing to the court, that the act was signed by the speakers of both houses, attesting its due passage; enrolled and approved by the governor; published as a law among the other laws of the State, under the official sanction of the Secretary of State; and that in 1869 the legislature had recognized and specifically amended the act; the court, without considering the testimony offered, or the objections thereto, *held*, that the town could not, as against the plaintiff, show that the act was not constitutionally passed.

The transcript, certified to by the Secretary of State, and offered in evidence, although *false in fact*, was, *upon*

*its face*, admissible under the ruling of *Spangler* v. *Jacoby*, 14 Ill., 300, if the view of Judge DRUMMOND as to the estoppel is not sustained; because the Secretary of State certified that he was the custodian of the *original journals* of the proceedings of the legislature for the year 1857, and that the same *then remained in his office*. So it appears that the sole question in issue *now*, was not passed upon in the Perkins case, either in the Circuit Court or in this court, and for that reason, it is submitted, that the court may properly consider this as a new question.

## The Case at Bar.

It is conceded by the defendant (1st finding) that the bonds are valid obligations of the defendant, if the act in question was and became a valid statute of Illinois, in pursuance of the constitution of that State.

That, then, is the sole question to be decided, and upon that question the case finds:

(1.) That ever since the year 1857, there has been on file, in the office of the Secretary of State of Illinois, an enrolled law, bearing the title of the act referred to above and in said bonds, duly signed by the speakers of both houses of the legislature of Illinois for the year 1857, and approved by the governor of said State, 18th February, 1857.

(2.) That said enrolled law, so deposited in the office of said Secretary of State, was published with and among the public laws of said State passed in 1857, in a volume labeled "Laws of Illinois, 1857," published in pursuance of the law of said State, to which was attached the certificate of the said Secretary of State, that the laws therein contained are true and perfect copies of the enrolled laws on file in his office.

(3.) That at the session of the said legislature for 1857, the secretary of the senate, with the aid of his assistants, in accordance with the general usage before and after that time, kept minutes of the proceedings of that body, during each day, as the business progressed, and after the close of the session for the day, made up, *from* these minutes, the *journal* of the proceedings for that day, on paper prepared for that purpose, fastening the whole together at the top; that the journal so kept and made up, was the *full* and *complete journal* of the proceedings of the senate for that day, and was the *original journal* of the senate—the journal which it was the duty of the secretary of the senate, under the law then in force, to deposit, within ten days after the adjournment of the legislature, in the office of the Secretary of State; and the journal which it was the duty of the person taking the contract from the Secretary of State for copying the laws, &c., as hereinafter stated, to copy into a "well bound book," to be furnished by the Secretary of State, under the act of 12th February, 1849. That in pursuance of said last named act, the Secretary of State furnished said book, and caused the journal of the senate to be copied therein, and the book still remains in the office of said Secretary of State. But the persons who in fact copied said journal into said book, for the year 1857, were not charged by law with the duty of copying said journal into said book, and the copy so made was not compared with the original by the Secretary of State, nor by any sworn officers of the State, nor by any other person whatever.

(4.) That the copy of the senate journal for 1857, appearing in said book, was made as follows: One Collard had the contract for such copying, and was under bond to do the same. He failed to perform the contract. John

S. Roberts, who, in the winter of 1857, was the principal enrolling and engrossing clerk of the senate, and a Mr. Higbee, an employee of the senate, applied to the Secretary of State for permission to do the work. That the Secretary of State replied that he did not care who did the work; that he held Collard's sureties responsible, and if they did not object, he would not. The sureties assenting, Roberts and Higbee took charge of the work, and the journals of the senate, by request of the Secretary of State, were handed to Roberts and Higbee to be copied into the well bound book; and Roberts, in conjunction with Higbee, either copied himself, or in a general way superintended the copying of the journals of 1857.

(5.) That soon after the adjournment of the legislature of 1857, the journals of the legislature were published by the Secretary of State; that they were printed by the public printer. That when the original journals were taken to the office of the public printer, they were separated, and the sheets distributed to compositors for the purpose of being printed. That the journals were printed under the official supervision of the Secretary of State. That he *caused* the printed copy to be compared with the original journals, with a view of having them correct. That it was his *habit* to compare the printed journals with the originals *when he could conveniently do so*, and when he could not, it was the *duty* of his assistants to do it. That he could not remember whether the portion of the printed journal relating to the statute in question, was compared with the original by himself or his assistants, and that it does not appear who compared that particular portion of the journal.

(6.) That after the *original journals* had been *copied* into the well bound book, and *printed, as aforesaid*, no

care was taken to preserve them, and the same are now *lost*.

(7.) That the transcript offered in evidence by the defendant, for the purpose of showing that the act in question was not constitutionally passed by the Senate, and which was admitted against the objections of the plaintiff, subject to consideration upon the whole evidence (see record, 18 and 19), being a certificate of the Secretary of State, under his hand and the great seal of State, purporting to contain a full and complete copy of all the entries in the *original journals* of the Senate for the year 1857, of the proceedings had in the Senate relating to the act in question, was taken from said alleged *copy* of the original journal, so appearing in said well bound book, now in the office of the Secretary of State, and not from the original journals, nor from any authenticated copy of the original journals.

The real contention in this case is, as to the admissibility of the *printed* copy of the journal, and the *transcript* from the "well bound book," certified to by the Secretary of State, as evidence to overcome the presumptions in favor of the act in question. The defendant contends that these are competent and legitimate evidence of the contents of the original journal of the Senate, and the plaintiff denies this. If this court is with the plaintiff on that question, the defendant must keep its obligation.

## II.

## History of the Legislative Journals, and a Review of the Statutes.

The history of the legislation of Illinois, relating to the journals of its legislature, as shown in the statutes above

referred to, is exceedingly instructive. It throws a flood of light upon the question at issue. It shows what constitutes the original journals, and by conclusive inference, what does *not* constitute them.

It is significant to observe that there is no provision of either constitutional or statutory law, providing *how* or in *what manner* the legislative journals shall be kept; although, from 1836 to 1849 it was provided that they should be kept *in* well bound books. With this exception, covering a period of thirteen years, there is no direction whatever. The Senate and House are left to keep their journals in such way and manner as they may please. The legislature is as independent of the Supreme Court, in *this* respect, as the court is of the Legislature, as to *its* records. Whatever the Legislature *keeps* and *deposits* with the Secretary of State *as its journals*, would seem *to be* its journals; and it would also seem that nothing else could be, or could be declared to be.

The acts of 24th January, 1835, and 16th January, 1836, require the *clerks* of the two houses, and *not* the Secretary of State, to furnish to the *public printer*, every morning, a *copy* of the journal of the preceding day, to be printed.

These statutes were in force in 1857.

The statute of 1836, required the secretary of the Senate and clerk of the House, within ten days after the adjournment of the legislature, to "*deposit* the *original journals* "kept by them as aforesaid, with the Secretary of State."

The secretary of the senate, at the session of the legislature in 1857, in accordance with the general usage, both before and after that time, kept *minutes* of the proceedings of that body, during each day, as the business progressed, and, after the close of the session for the day,

made up, *from* these minutes, the *journal* of the proceedings for that day, (5th finding.) It was *this journal*, and *not the minutes from which it was made*, that the secretary of the senate was required to *deposit* with the Secretary of State; and until this journal, so made, was deposited with the Secretary of State, he had nothing in his possession even purporting to be journals. It does not appear that the secretary of the senate ever deposited with the Secretary of State the *minutes* of the proceedings of the senate, so kept as aforesaid, and it is not to be presumed that he did.

The Constitution of 1848 directed the legislature to provide by law, that the * * *copying*, *printing*, binding and distributing of the laws and journals should *be let by contract* to the *lowest responsible bidder*.

Pursuant to this mandate, the legislature, by the act of 12th February, 1849, provided that within thirty days previous to the meeting of the legislature, the Secretary of State should cause an advertisement to be published * * * inviting proposals for *copying* the laws * * * and journals of the General Assembly, and that he should give the contract to the lowest, competent, responsible bidder, and furnish him a "well bound book" in which to *copy* the journals. All that was required of the *Secretary of State*, by the constitution and act aforesaid, was that he should *let the contract* for copying, and *furnish* the "well bound book." His official functions were then at an end. The *copyist* was then required to take the *original journals*, which the secretary of the senate and clerk of the house had made and deposited with the Secretary of State, and copy them into the "well bound book." He had no authority to treat them as *minutes* from which a journal was to be *made*. He had no right to add to or

subtract from them even a word, or letter, or comma. He was simply to *copy* what was deposited with the Secretary of State as *the* journals. This book was not made under any official sanction whatever. The contractor to *write* a copy, and the contractor to *print* a copy, were neither of them officers of either the State or legislature. They were both, under the provisions of the statute, *when it was followed*, but the lowest bidders, on an advertisement inviting proposals for copying and printing for the State; mere *contractors*. The legislature never at any time gave the "well bound book" any legal standing or office. It never made its contents evidence of anything; never called it anything but a copy; not even "*minutes*."

There was no provision of law at any time making the printed copy of the journal evidence, until the adoption of the Revised Statutes of 1874.

It appears from the 9th finding, that there had been, in the practice of the office of the Secretary of State, great looseness in regard to the care and preservation of the journals of the legislature, required by law to be deposited there; that instead of making *copies* for the use of the public printer, sometimes the *original* journals themselves had been given to him; that at other times these originals had been given to the *copyist*, instead of depositing them with the Secretary of State; and that no care was taken to *preserve* the original journals, and that the same were *lost*. To remedy this evil, and to preserve the evidence, and the *only evidence* under *Spangler* v. *Jacoby*, by which it could be determined whether or not an act had been constitutionally passed, the legislature, by the act of March 20th, 1869, provided that the Secretary of State should, *in no case*, premit the *originals* to be

taken from his office, and by the act of 20th April, 1873, provided, "that the *original journals*, which may be pre- "pared by *the Secretary of the Senate* and the *Clerk of* "*the House of Representatives*, shall be securely *bound in* "*books*, and filed in the office of the Secretary of State."

The act of 16th January, 1836, directed that the journals of the legislature should be kept in "well bound "books," and that the Secretary of the Senate and Clerk of the House, should, within ten days after the adjournment of the Legislature, *deposit* the *original journals, kept by them as aforesaid*, with the Secretary of State. There is, in the office of the Secretary of State, a series of these "well bound books" (12th finding), purporting to be the journals of the legislature, and labeled as such, from an early date to 1874, of which series the "well "bound book," labeled "Senate Journal, 1857," is one. The act of 12th February, 1849, provided that the *Secretary* of *State* should furnish these books, and that the journals should be *copied into them* by the person contracting for that work. All these books made prior to the adoption of the constitution of 1848, and the passage of the act of 12th February, 1849, were, in fact, made by the Secretary of the Senate and the Clerk of the House, and their assistants, as the *original* journals of said bodies, and by said officers *deposited* with the Secretary of State *as* the original journals, and that all of said books in said series, made *after* the adoption of the constitution of 1848, and the passage of the act of 12th February, 1849, in pursuance thereof, are the works of said copyist.

The act of 9th March, 1869, directs that copies of all * * documents, *legally deposited* in the office of the Secretary of State, when certified by the Secretary of State, and authenticated by the seal of his office, shall be

received in the *same manner*, and with *like effect, as the originals.* Under this statute, it is only copies made from *originals*, that are to be received with the same effect *as* the originals. The copies must be made from documents *legally deposited* in the office of the Secretary of State; *not* from some book which itself is furnished *by* the said Secretary, and which purports to contain only a *copy* of an original which had been deposited.

The legislature, by its recent legislation, manifestly did not intend to destroy any evidence previously existing, but rather to provide for the *preservation* of that which the Supreme Court, in *Spangler* v. *Jacoby*, had declared to be legitimate and competent on the question of the existence of a statute. To this it added the printed copy of the journals, under the conditions then for the first time made. If the "well bound book" was an *original* journal, and so of *itself* competent evidence, no reason can be assigned for this new legislation. But if that book had no legal character, was not competent evidence for the purpose claimed, and no care had been taken of the original journals, and they had been lost, then, and only then, was the legislation necessary. This new legislation is a significant declaration against the conclusion reached in *Miller* v. *Goodwin*, hereinafter considered.

In view of the statutes above quoted, and of the unqualified use therein of the words, "original journals," as applied only to those made by the secretary of the senate and clerk of the house; of the fact that these journals were directed to be *copied* into the "well bound book," by some lowest bidder for the work, not even under the supervision of the Secretary of State, and not under the supervision of the officers making the journals; of the fact that no person but the officers making the journals,

has the slightest right to add to such journals as so made, or to take therefrom, a single word or letter; of the fact that the journals, as kept by these officers, are in *all* the acts of the legislature called the *original* journals, and the printed journal and the well bound book, called *copies;* of the fact that the well bound book was never, at any time, made evidence by the statute, and the printed volumes of the journals never made evidence, until 1874, and then only when the Secretary of State attached his certificate thereto, after a careful comparison, that they are true copies of the originals; of the fact that the Supreme Court of Illinois, in 1867, in view of all this legislation, had declared there was then no law which made the *printed* journal evidence; and of the fact that since this well bound book *was not made or kept by or under the direction or supervision of the secretary of the senate, or clerk of the house* it was *not* one of the "books, bills, documents or papers in the *possession* of either branch of the General Assembly," which they, at the close of each session, were required, by Ch. 96, § 8, of the Rev. Stat. of 1845, to deliver to the Secretary of State; of the fact that this well bound book was not required to be made by the "lowest bidder" therefor, until ten days after the General Assembly had adjourned, and the original journals had been deposited with the Secretary of State, and in view of the fact that the statute of 16th January, 1836, the Rev. Stat. of 1845, and the act of 12th February, 1849, requiring the journal to be kept and copied into "well "bound books," were repealed in 1874; in view of all these statutes and facts, *it will strike the legal profession with not a little astonishment and alarm* that these *original journals*, so made and kept, and so directed by statute to be deposited with the Secretary of State, within ten days after the adjournment of each session of the legislature,

and which *originals* the Secretary of State is directed by statute of 20th March, 1869, in *no case* to be permitted to be taken out of his office, and which again, by the act of 1873, are directed to be securely bound in books, *just as they are prepared by the officers* of the *General Assembly*, before being deposited with the Secretary of the State, should be called by the Supreme Court of Illinois, "*cur-*" *rent minutes*, taken by the clerks and secretaries, and " their assistants in the respective houses," and that they were "*not understood* to be journal records, but *minutes* " merely, as they were in fact, to be transcribed into such " records."

It will be seen from the acts of 14th February, 1831, and 20th March, 1869, that while the Secretary of State, between those dates, was required to superintend the printing of the *laws, acts and resolutions*, and to carefully compare the printed copies with the *original laws* and rolls deposited in his office, correcting all errors that may appear in such printed copies, and to certify at the end of such printed copy that the acts, &c., so printed are exact copies of the rolls in his office, *he was not required*, until the passage of the act of 20th March, 1869, to superintend the copying of the journal for *any* purpose, and *then* only for the use of the *printer*, and not into the well-bound book. He was never required to compare the copy written into the well-bound book with the original, or to certify that the said copy was correct.

In view of these acts of the legislature, it was quite natural that the Supreme Court of Illinois should have said, in 1867, in *Illinois Central R. R. Co.* v. *Wren*, 43 Ill., 79 :

If counsel say the *Journal* shows a law to have been passed without calling the yeas and nays, let them make

the requisite proof of that fact by means of the legislative journals, and introduce that proof into the record. In the present case we have been referred to the *printed journal. We are not aware of any law which makes the printed journal evidence of the contents of the original.*

The contention as to the existence of the act in question disclosed the fact that there was no law for the *preservation* of the *original journals;* that while the act of 20th March, 1869, provided that the Secretary of State should in no case permit them to be taken from his office, still, they were in small parts, each day's journal by itself, and were very liable to be lost, mislaid or wrongfully taken. To remedy this, the act of 29th April, 1873, was passed, requiring the Secretary of the Senate and Clerk of the House to securely bind their journals in books before depositing them with the Secretary of State.

It appears from the twelfth finding that said entire series of well-bound books, labeled as the journals of the legislature, up to 1874, and found in the office of the Secretary of State, by the *usage* of the respective Secretaries of State, have always been *treated* as the official records of said journals, and that so far as the evidence shows, no other copies of such journals were ever preserved as official documents.

The "usage" of an office which took *no care to preserve* the original journals required by law to be deposited therein, until positively compelled by statute to do so; of an office which uniformly disregarded the plain provisions of the statutes relating to them, is not entitled to much consideration in any court. It can make but little difference what such an office "*treats*" as official records. It is preposterous to set up the "usage" of such an office against the positive requirements of the statutes.

Such a "usage" cannot *create* an original journal, nor make evidence for this court.

## III.

## The presumptions are in favor of an enrolled law, as a law in force.

*Spangler* v. *Jacoby*, 14 Ill., 300.
*Turley* v. *Logan Co.*, 17 Ill., 152.
*Larrison* v. *Railroad Co.*, 77 Ill., 12.
*People* v. *Lowenthal*, 93 Ill. 207.

When an act of the legislature has been signed by the speakers of both houses, approved by the governor, and deposited in the office of the Secretary of State, it becomes a *public record* in his office, may be certified as such, and it is PRESUMED that it became a law, pursuant to the requirements of the constitution.

In many of the States, such a record is the *ultimate* evidence as to what the law is.

*Hunt* v. *Van Alstyne*, 25 Wend., 606.
*People* v. *Devlin*, 33 N. Y., 279.
*Pangborn* v. *Young*, 32 N. J., 30.
*Duncombe* v. *Pringle*, 12 Iowa, 11.
*Fouke* v. *Fleming*, 13 Md., 413.
*Pacific R. R.* v. *The Governor*, 23 Mo., 362.
*Evans* v. *Browne*, 30 Ind., 519.
*Brodnax* v. *Groom*, 64 N. C., 247.
*Eld* v. *Gorham*, 20 Conn., 16.
*Lottery Co.* v. *Richoux*, 23 La. An., 743.

But in Illinois, under *Spangler* v. *Jacoby*, the presumption arising from such a state of facts is conclusive in favor of the existence of a statute, only in cases where the

original journals of the legislature are lost or destroyed. It will then sustain the statute as a law in force.

The Illinois *Rev. Stat.* of 1845, ch. 40, § 1, provided that

> The printed statute books of * * * this State, purporting to be printed under the the authority of the State, shall be evidence in all courts and places in this State of the acts therein contained.

*But this presumption may be overcome, and the operation of the law defeated, by the original journals.*

This doctrine was first considered by the Supreme Court of Illinois, in *Spangler* v. *Jacoby*, in 1853.

It was there declared, that the constitution requires each house of the legislature to keep a journal, in which certain facts, made essential to the passage of a law, shall be stated—that if those facts are not therein set forth, the conclusion is that they did not transpire—*that the journal is made up under the immediate direction of the house*, and is presumed to contain a full and complete history of its proceedings; that when a contest arises as to whether an act was thus passed, the *journal* may be appealed to, to settle it; that the journal is the evidence of the action of the house, and by *it* the act must stand or fall; and if the journal *is in existence*, and it fails to show that the act was passed in the mode prescribed by the constitution, the presumption is overcome, and the act must fall: that the office of the journal is to record the proceedings of the house, and authenticate and preserve them; and that it is clearly competent to show *from the journals* of either branch of the legislature that a particular act was not passed in the mode prescribed by the constitution, and thus defeat its operation altogether.

While this doctrine, just as stated, has ever since been

uniformly maintained by the Supreme Court of Illinois, it has been maintained without any attempt at modification until the case of *Miller* v. *Goodwin.*

## IV.

## The question of the existence of a Statute is to be determined by the Court.

We are met at the threshold of this case by the claim that the Supreme Court of Illinois has passed upon this question, held that the act referred to was not constitutionally passed, and, therefore, never existed, and that this court is *concluded* by that decision.

If the question to be decided came within the rule of this court, "that it will adopt and follow the decision of "the State courts in the *construction* of their own consti- "tution and statutes," there would be some ground for the claim. But it does not come within that rule. The constitution of Illinois and the act in question are both plain and simple, and need no construction. None has been given to them by the State court, and none is sought here. The question of the *existence* of a statute is not one of *construction*, but of *fact*, and belongs to the domain of general jurisprudence, and the decision of the State court, even *upon the same evidence*, is not binding on this court.

In *Pine Grove* v. *Talcott*, 19 Wall., 677, this court says:

It is insisted that the invalidity of the statute has been determined by two judgments of the Supreme Court of Michigan, and that we are bound to *follow* those adjudications. * * The question before us belongs to the domain of general jurisprudence. In this class of cases, this court is not bound by the judgments of the courts of

the States where the cases arise. It must hear and determine for itself. Here commercial securities are involved. * * Were we to yield, in cases like this, to the authority of the decisions of the courts of the respective States, we should *abdicate the performance of one of the most important duties with which this tribunal is charged*, and disappoint the wise and salutary policy of the framers of the constitution in providing for the creation of an independent Federal judiciary. The exercise of our appellate jurisdiction would be a solemn mockery.

This court holds that the question is a *judicial* one, to be settled by the *court*, and not by a jury, and is open for examination in this court upon any accessible, competent evidence.

*South Ottawa* v. *Perkins*, 94 U. S., 261.
*Walnut* v. *Wade*, 103 U. S., 689.

But while under the rule of this court, the question is to be decided by the court and not by a jury, *still* it must be decided as a *question of fact*, upon evidence competent, legitimate and legally applicable. This court, upon such an issue, must necessarily decide for itself what *is* competent and legitimate evidence.

In the South Ottawa case it is declared that,

Any particular State may, by its constitution and laws, prescribe what shall be conclusive evidence of the existence or non-existence of a statute; but the question being a judicial one in its nature, the mode of *ascertaining* and *using* that evidence must rest in the *discretion* of the court on which the duty in any particular case is imposed.

It must follow, as a deduction from this rule, that in the *absence* of any *constitutional* or *statutory* provision prescribing what shall be conclusive evidence, this court, in the exercise of its own sound discretion, must ascertain for itself whether, in case of the loss of the original journals of the legislature, there is any evidence legally competent, legitimate and applicable to overthrow the almost

conclusive presumptions arising in favor of the existence of an enrolled law, as a law in force.

## V.

## Character and quality of the evidence requisite to overcome the presumption in favor of an enrolled law.

(*a.*) The only evidence admissible is the *original journals*, and, if these are lost or destroyed, the *presumption* will *sustain* the law.

*Spangler* v. *Jacoby*, *supra.*

(*b.*) The Supreme Court of Illinois have said that if it find a law signed by the speakers of both houses, and approved by the governor, it must *presume* that it has passed in conformity to all the requirements of the Constitution, and is valid, until the presumption is overcome by *legitimate proof*. And, in such a case, the evidence must be *clear* and *convincing:* that it is by no means sufficient to create a *doubt* whether the requirements of the organic law have been observed, but it must be *clearly proved.*

*Larrison* v. *Railroad Company*, 77 Ill., 18.
*People* v. *Loewenthal*, 93 Ill., 208.

(*c.*) The case finds that the *original journal* of the Senate for the year 1857, the journal "*made up under the* "*immediate direction of the Senate*," as described in *Spangler* v. *Jacoby*, the journal made up by the *Secretary* of the *Senate*, from the minutes of the proceedings of the Senate as the business progressed, containing the complete journal of the proceedings of the Senate for each day, *is lost*, and that no copy, certified therefrom, was produced in evidence.

(*d.*) Of the seven or eight cases in the Supreme Court of Illinois, prior to *Miller* v. *Goodwin*, in which the fact of the *existence* of a statute has been passed upon, no proof has been admitted or held competent and legitimate to overcome this presumption, except the *original journals* of the legislature.

(*e.*) Whether the documents offered in evidence are or are not original journals, is also purely a question of *fact*. It is not in the province of any court to determine this fact, except upon the proofs in the case.

It is said, in *South Ottawa* v. *Perkins*, that, as it is the settled construction of the constitution of Illinois, that no act can be deemed a valid law, unless, *by the journals of the legislature*, it appears to have been regularly passed by both houses, it becomes the duty of the courts to take *judicial notice* of the *journal entries* in that regard. It is submitted that it is not necessary to the maintenance of this case to controvert this doctrine, although a different course of procedure is adopted by the Supreme Court of Illinois.

*Illinois Central Railroad Co.* v. *Wren*, 43 Ill., 79.

It can make no difference in the result whether the rule of this court or the rule of the Supreme Court of Illinois is adopted. The *latter* court has declared that it is by the *journals only* that the validity of a law can be attacked, upon the ground that it was not constitutionally passed—and that, in case the journals are *lost* or *destroyed*, the presumptions will *sustain* the act as a law in force.

*Spangler* v. *Jacoby*, 14 Ill., 300.
*Turley* v. *Logan Co.*, 17 Ill., 152.

And *this* court declares that it is *by the journals* that

the question of the existence or non-existence of the statute must be determined. Although determined by the court, yet, by the evidence contained in the journals. It must be presumed that this court will hold with the Illinois court, that if the journals of the legislature are *lost* or *destroyed*, and are *not in existence*, the presumption in favor of an act, signed by the speakers of both houses, approved by the Governor, and deposited with and published by the Secretary of State, will sustain it as a law in force.

We are, then, brought back to the real question, has the journal of the Senate of Illinois for the year 1857 been lost or destroyed, or is it now in existence? This question would seem to be conclusively settled for this court by the *ninth* finding, that, after the copying and printing, "no "care was taken to *preserve* such *original journals*, and "the same are now *lost*."

## Printed copies of the Journals.

These copies of the journals were never made evidence until by § 8, ch. 124, of the revised Statutes of Illinois of 1874, and then only when certified to by the Secretary of State that it is a *true copy*. Hence the declaration of the Supreme Court of Illinois, in 1867, in *Railroad Co.* v. *Wren*, when a printed copy of the journals was sought to be introduced in evidence;

"We are not aware of any law which makes the "printed journal evidence of the contents of the original."

While the act of 1836 required the Secretary of State to *superintend* the printing of the journals, and it is to be presumed that he did so, still the printed copy had never been declared to be evidence until 1874; and had never been held by the Supreme Court to be evidence, but,

on the contrary, had been held by said court not to be evidence;

The copy of the journal supposed to be contained in the well bound book, as is elsewhere shown, was never made evidence at any time.

## VI.

## Illinois Decisions Relied on to Support the Defense.

This court is urged to declare against the bonds in suit on the authority of *Ryan* v. *Lynch*, decided at the June term of the Supreme Court of Illinois, 1873, and reported in 68 Illinois, 160, and *Miller* v. *Goodwin*, decided at the September term of said court, 1873, and reported in 70 Ill., 660.

*Ryan* v. *Lynch* is a bill in chancery, filed by certain *tax payers* of the town of Ottawa (the defendant in this suit) against the *collector* to restrain him from collecting a tax levied to pay the interest on the bonds in suit. This suit was a *family* affair, in which apparently *both* parties desired the result obtained. The only evidence offered was the certificate of the Secretary of State, purporting to show what the Senate journal contained relating to the passage, in that body, of the act in question. It was admitted without objection. We may assume, for the purposes of the argument on the force and weight of that case, that if the certificate had been made from the *original journal* of the senate *then remaining in the custody* of said secretary, it would have been legitimate evidence upon the issue made in that case. The *fact* is, that the original journal was *not* then

in the custody of said secretary, and he did not make his certificate therefrom, and did not state that he made it from the "well-bound book." Hence, *that* case was decided upon evidence *apparently* true, but *false in fact*, and has no bearing on this contention.

*Miller* v. *Goodwin* is a bill in chancery by taxpayers of the town of Aurora against the collector of the town and the treasurer of the county to restrain the collection of a tax levied to pay the interest on bonds issued under the authority of the act in question. A certificate of the Secretary of State, relating to the contents of the senate journal, similar to that offered in *Ryan* v. *Lynch*, was offered to prove the contents of the journal, and objected to. Evidence was then offered by the complainant to *impeach* the transcript certified to by the Secretary of State. The court does not state what this impeaching testimony was, but it is fair to presume that it was evidence showing the *loss* of the senate journal, and that the transcript certified to was not taken from the *original journal*, and so was not admissible as evidence for the purpose offered.

If the court, in its opinion, has given a fair and correct analysis of the testimony in that case, it is very clear that it was quite different from the facts found by the court below in this case, and so, the *facts* being different, the case is clearly not binding, except upon the parties in that particular case.

The court, in that case finds *as facts*, from the "effect" of evidence "*then before it*" that

The *minutes* of the proceedings of the General Assembly of 1857, were taken down by the proper officers of the respective houses, on sheets composed of blanks prepared for conveniently taking the "ayes" and "noes" on "cap" paper, which were fastened together at the end

of each days's proceedings, and subsequently deposited with the Secretary of State. These the secretary caused to be copied, in regular and proper order, in a bound volume, prepared and kept in his office for that purpose, which was called "The Journal Record." When the *minutes* were thus copied, they were sent to the public printer, and were never returned.

Now, it is found, in the case at bar, that the *minutes* of the proceedings of the senate, kept during each day by the secretary of the senate, as the business progressed, *were never* "*deposited* with the Secretary of State"; that the Secretary of State never "caused these minutes to be cop-"ied in a bound volume"; that these minutes were never "sent to the public printer"; but, on the contrary, this case finds, what every school boy knows must have been the fact, even without evidence, that the secretary of the senate, "after the close of the session for the day, *made* "*up from these minutes* the journal of the proceedings for "that day, on paper prepared for that purpose, fastening "the whole together at the top; which journal so kept "and made up, was the full and complete journal of the "proceedings of the senate for that day, and was the "*original journal* of the senate." Certainly, if the opinion in *Miller* v. *Goodwin* truly states the evidence, *then* before the court, a very remarkable case was made; one entirely different from this case, and from the *truth* of the matter, and one which can be no guide or authority to this court.

The case of *Miller* v. *Goodwin* is open to many criticisms.

It cites § 3 Ch. 84 of the Rev. Stat. of 1845, which is, in fact, a re-enactment of the act of 16th January, 1836, to show that the journal of each house was required to be KEPT in "well bound books."

It then cites § 3 of the act of 12th February, 1849, which requires the Secretary of State, under public competition, to let the contract for *copying* the laws, resolutions and journals, and to furnish a "well bound book," in which the *journals* (*not minutes*) shall be *copied* by the contractor.

It then declares that these statutes are in *pari materia*. They do relate to the same subject. This, however, is not a *constitutional* mandate. It is purely statutory. Under the first act, the Secretary of the Senate himself, with the aid of his assistants, using the minutes of the proceedings of that body, made up the journal for the session in a "well bound book," and *deposited* that *book* with the Secretary of State. Under the second act, he made up his journal in the manner specified in the fifth finding, and was required to deposit *that* with the Secretary of State. A new provision had been made about the well bound book, under which the Secretary of the Senate had nothing to do with it. The *latter* act does not declare, as does the *first*, that the journal shall be *kept* in well bound books, but declares that the journal made by the Secretary of the Senate shall be *copied into* a well bound book, to be furnished by the Secretary of State. So that, while both acts relate to the same subject matter, they are different in their requirements, and the latter repeals the former, as to the manner in which the journal shall be *kept*.

The opinion in *Miller* v. *Goodwin* declares that:

It is obviously impracticable to *record* the proceedings of each house as they transpire, in "well bound volumes," as must have been well known to the members of the legislature, yet the journals *must thus be kept*, and it is certainly impossible that the journals shall be copied into a well bound book unless there is something to copy from.

Plainly the *current minutes* taken by the clerks and secretaries and their assistants, in the respective houses, were

not understood to be "journal records," but minutes merely, as they were in fact, to be *transcribed* into such records.

Precisely what is here meant, in view of the facts in this case, and of the statutes in force at the time, it is not easy to ascertain.

(1.) There was then no provision of law requiring the proceedings of each house, as they transpired, to be *recorded* in well bound volumes or in anything else.

(2.) There was then no provision of law requiring the journals to be *thus kept.*

(3.) It is true that it would be impossible to copy the journals into a well bound book, if there was nothing to copy *from*; but it would be, and was, quite possible to copy the journals, made up by the Secretary of the Senate and deposited with the Secretary of State, into a well bound book.

(4.) It is also quite true, that the current minutes, taken by the Secretary of the Senate, were not understood to be "journal records," but minutes merely, and no one ever claimed to the contrary, but they were minutes to be used by the Secretary of the Senate to *make up* his journal, and by no one else, and for no other purpose.

(5.) There are no such things as "journal records" known to the law. The well bound book made under the act of 12th February, 1849, is not a *record*, under the law providing for its existence. It has no official designation but "well bound book," and no function but to receive the copy of the journals as written into it by the contractor for that purpose. *Calling* a book a "journal record" does not change its character. The original journals, when filed with the Secretary of State, become *records*, and the

*only* records relating to the proceedings of the legislature. Calling the original journals of the senate "*cap paper packages*," does not detract from their dignity, or change their official character.

It having been objected to the well bound book, or any copy therefrom, as evidence, on the ground, among others, that the book was not signed by the Secretary of the Senate, nor even certified by by the contractor for copying, the court holds that the guaranty of accuracy and fidelity lie in the "obligations of official duty," as in cases of records made by clerks of courts. When it appears from the statutes that the contractor for copying bears no official relation whatever to the State or legislature; that the contractor for copying the journals of 1857 failed to do the work, and other parties, not recognized by the statute, were permitted to do it, the obligations of official duty must be exceedingly attenuated.

But it would appear, from *Miller* v. *Goodwin*, that the *original jonrnal*, which the constitution directed the senate to *keep* and publish; which, according to *Spangler* v. *Jacoby*, is made up *complete* by the secretary of the senate, under the direction of the senate; which, by the act of 1836, the secretary of the senate is directed to *deposit* with the Secretary of State; which, by the act of 12th February, 1849, is required to be *copied into* a well bound book; which, by the act of 20th March, 1869, the secretary of State is directed in no case to be permitted to be taken out of his office; which, by the act of 29th April, 1873, is directed to be securely bound in books, by the secretary of the senate, and by him filed in the office of the Secretary of State, was forsooth, nothing but "*current minutes*" of the proceedings of the senate (!) and did not become a journal in fact until copied into the

"well-bound book" by the copyist, who was the "lowest bidder" for the work!! Now that the statutes requiring the journal to be copied into this "well-bound book," have been *repealed*, there can no longer be any "original" journals of the legislature. Nothing is now left by which to verify the proceedings of the legislature, but some "*current minutes*"!! It is fortunate that these are directed to be securely bound in books, and filed in the office of the Secretary of State!

## VII.

**This court has uniformly held that the municipalities must ascertain the existence of all facts which authorize the issuing of bonds, and that the recital of a fact in a bond estops them from denying it.**

*Commissioners* v. *Aspinwall*, 21 How., 540.
*Coloma* v. *Eames*, 92 U. S., 484.
*Marcy* v. *Oswego*, 92 U. S., 638.
*Humboldt* v. *Long*, 92 U. S., 642.
*Commissioners* v. *Bolles*, 94 U. S., 106.

The existence or non-existence of the act in question, is conceded to be a question of *fact*, solely. The defendant could have taken no action towards issuing the bonds, without first ascertaining, as a fact, that the law authorizing their issue actually existed. This was the first fact, in the series of facts, which the defendant must determine. It did determine this fact, and recited in the bonds that they were "issued *in pursuance of* an election or "special town meeting, held in said town on the third "day of December, 1867, *under and by virtue of a cer-*"*tain act of the legislature of the State of Illinois, ap-*

"*proved February 18th, 1857, entitled,*" &c., being the act in question. The act, by the recital, is declared, as a fact, to be a law in force, and that the bonds are issued under and by virtute of its authority. The holding of the election to authorize the issuing of the bonds, is another fact to be determined before the bonds could be issued. The recitals determine this fact. The bonds could not be lawfully issued without the *vote* authorizing it, any more than they could without the *statute* authorizing it.

This court has uniformly held, that the recital of the *fact of a vote*, authorizing the issuing of the bonds, estopped the town from denying it. Why, upon the same principle, should not the recital of the *fact of the existence of a law*, authorizing the issue of the bonds, estop the town from denying that? Is there any distinction in principle?

## VIII.

**Where the recitals show power to issue the bonds, a bona fide purchaser is bound to look for nothing except legislative authority to issue them.**

*Commissioner* v. *Bolles*, 94 U. S., 106.

Suppose this court should feel bound to ignore the rule held in so many States, that the enrolled law cannot be impeached; to ignore all the equities shown to exist in this case in favor of the plaintiff; and to apply the doctrine of *Spangler* v. *Jacoby*, and permit the defendant to show, *by the original journals* of the Senate, that the act was not constitutionally passed? While this would, as a *general* rule of law, shock the moral and commercial sense of the country, and destroy the confidence which every one

ought to have the *right* to repose in the validity of the published statutes of a State, as laws in force, and in the validity of the obligations and acts of its citizens and judicial tribunals thereunder, still, it ought not to avail the defense set up in this case. The necessities of that defense, to make it successful, require the court to go far beyond the case of *Spangler* v. *Jacoby*, the doctrine of which was the law of Illinois when the bonds in suit were issued.

What did that case require of the plaintiff when it purchased said bonds? It required the bank to look beyond the enrolled and published statute, to ascertain whether or not it had been constitutionally enacted. It directed the bank to the *original journals* of the legislature, as the *only* source of evidence on that question. These journals, by the statute, were required to be deposited in the office of the Secretary of State at Springfield, Illinois. The bank sends its agent there to examine these journals for the necessary evidence. He asks of the said Secretary permission to examine these journals, and is informed that they had not been preserved; that they were either lost or destroyed, and were not in existence. He looks then to see if there is anything more required of the bank, and going to what he *supposes* to be the highest authority, the Supreme Court, is informed that where the original journals are lost or destroyed, and not in existence, the *presumptions sustain the act as a law in force.* The bank then acts upon it as a law, and makes large investments under its authority. Shall it be protected? Will this court say, that in so acting, under the law of Illinois as then declared, the bank was acting under the peril, that *some time* the Supreme Court of Illinois might so change the rule of evidence established in *Spangler* v. *Jacoby*, that the bonds in its hands should become

worthless? That would be placing the commercial transactions between sister States in most destructive confusion, certainly.

This court is now asked, in order to assist the defendant to repudiate its obligations, to admit, as evidence to overcome the presumptions in favor of the act, not the original journals of the Senate; not any certified copy therefrom; not even a certified copy *from* a certified copy; but a certified copy from a book made under no legal sanction whatever, by persons not bearing, in respect of that work, any official relations either to the legislature or State; a book bearing no legal indications that it is even a copy of the original journals, and not *proven* to be such; a book coming within no principle or definition of legitimate or competent evidence, known to legal jurisprudence; a book never declared by the legislature of Illinois to have any legal character; a book which, for the very reason that it was utterly worthless for any purpose, has been legislated out of existence.

## IX.

**The defendant ought to be held to be estopped from denying the existence of the act in question.**

The Supreme Court of Illinois takes *judicial notice* of all acts signed by the speakers of both houses, approved by the governor, and deposited in the office of the Secretary of State, as laws in force.

*Railroad* v. *Wren*, 43 Ill., 79.

That court took judicial notice of the act in question, as a law in force, in 1870 and in 1871, in two cases

wherein the rights of parties were determined by said act, as a law in force.

*Dunnovan* v. *Green*, 57 Ill., 67.
*Force* v. *Batavia*, 61 Ill., 100.

In the case of *Dunnovan* v. *Green*, certain taxpayers of Dayton filed a bill against the collector, to restrain the collection of a tax levied to pay interest on the bonds issued by the town, under the authority of the very act in question. The court cites the law at length. The question was, whether the election was legal and the bonds properly issued. The court say:

We have been referred to no law which repeals the act of 1857, and the election must have been held under its provisions. *It being in force*, and the election being held under it, we must look to its requirements to determine whether the election was legal, and the bonds properly issued.

The controlling significance of this case is, that the Supreme Court of Illinois, in a proceeding based on the act in question as a law in force, treated and *declared* it to be a law in force. The rights of parties in both of the above cases were predicated upon that act, and were adjudicated upon it, as a law in force. Its existence was solemnly and fully recognized. If that court is bound by its rules, to recognize a statute, and to adjudicate upon and settle the rights of parties, predicated thereon, in all cases where the existence of the statute is not denied by proper plea, and its non-existence established by legitimate evidence, it would *seem* that citizens of other States ought to have the right to act, and act without peril, upon the statute as a law in force. To deny to them this right, would seem to be a fraud too glaring to tolerate.

There was nothing in the act that gave to any one any

notice whatever of its alleged invalidity. If it gave no notice to the Illinois courts, or to the defendants, it did not to the plaintiffs.

If there had been *no legislative act whatever*, giving authority to subscribe for the stock and issue the bonds, the rule of all courts is, that the bonds would be void in the hands of everybody.

If an act had been passed which was prohibited by the Constitution, the same consequences would follow.

Why? Because, in the first case, nothing *presumed* to be a law, nothing of which the courts or the people *take notice* as a law, exists; and in the second case, because, *on the face of the act itself*, when considered in connection with the Constitution, it shows its own invalidity. Of such defects the courts and everybody must take notice.

But ought this rule to be extended to a case where an act is *prima facie* valid, and the courts are bound to and do in fact take judicial notice of it, as a law in force, and all persons, while acting under it, are bound to take a like notice of it? Ought the courts and the people to refrain from acting upon statutes published as laws in force, upon the supposition that at *some time*, on some *issue of fact*, made up in a suit to which they are not parties, the court *may* find and determine that the legislature in the enactment of the statute failed to observe some one of the constitutional requirements?

The defendant does not deny that the act in question gave to it full authority to issue the bonds; it did issue them and they were placed on the market. Ought not the town, in such a case, to be compelled to perform its obligations? In

*Marsh* v. *Fulton Co.*, 10 Wall., 684,

Mr. Justice FIELD declared that

"The obligation to do *justice* rests upon all persons, "natural and artificial, and if a county obtains the money "or property of others, *without authority*, the law, *inde-* "*pendent of any statute*, will compel restitution or com- "pensation."

In *County of Moultrie* v. *Savings Bank*, 92 U. S. Rep., 631, the bonds there in suit recited that they were issued in pursuance of the subscription of the sum of $80,000 to the capital stock of the railroad company named, made by the Board of Supervisors of said county, in *December, 1869*, and in conformity to the provisions of an act of the legislature of Illinois, approved 26th March, A. D. 1869. The county undertook to set up as a defense to these bonds, in the hands of a *bona fide* holder, that the subscription aforesaid was not in fact made until *after* the 2d day of July, 1870, the day when the Constitution of Illinois of 1870, *prohibiting* such a subscription to be made, went into effect. It was clear that if the subscription had been made after the 2d of July, 1870, it was made without authority, as the act originally authorizing it had been abrogated by the Constitution, and it would be as if it had never existed. But the bonds *recited* that it was made in the December before. The court say:

How can the county be permitted to set up against a *bona fide* holder of the bonds, that the *authority* to make the subscription, with all its legitimate consequences, had expired before the subscription was made, *in face of the recitals* and of the county record? Whether it had expired *was a matter of fact*, not of law; and it was peculiarly, if not exclusively, within the knowledge of the Board of Supervisors. After having assured a purchaser that their subscription was made in December, 1869, when they had power to make it, *it would be tolerating a fraud* to permit the county to set up, when called upon for pay-

ment, that it was not made until after 2d July, 1870, when their authority expired.

This case shows, that there may be recitals in a bond that preclude the inquiry *even into the fact of authority to issue them;* recitals that it would be *fraudulent* to contradict.

If it were true, as claimed, that the subscription was not made until after the new constitution went into effect, 2d July, 1870, then there was, in fact, no statute *in existence*, which authorized the subscription, and the issuing of the bonds. Yet, this court would not allow the county to show that, as against the recitals in its bonds, because it would be tolerating a fraud.

Apply this rule to the case at bar. The bonds recite, *as a fact*, the *existence* of the act in question as a law in force; and that they are issued *under* and *by virtue* of it. The existence of this act is a question of fact, which could and should be as well known to the defendant as to any one, and better than to the plaintiff, for the defendant's representative helped to make it. After making the assurance to the plaintiff that the act in fact existed as a law in force, giving full authority to issue the bonds, and it so appearing to the plaintiff upon inspection thereof in the published statutes of the State, would it not clearly be "tolerating a fraud" to permit the defendant to deny the truth of its assurance? Is the purchaser of these bonds, at his peril, bound to know more as to the facts of the existence of the public and published laws of a State than its courts and people? Is it at his peril that he assumes as true what its courts take judicial notice of as a fact, and its people assure him to be a fact? If he lends them his money on these assurances, can they keep it, and refuse to return it, on the plea that the assurances

were false? If so, it must be upon the basis of a rule of jurisprudence hitherto unknown in civilized communities.

The rule of this court, on the subject of estoppel, as applied to municipal corporations, is, that the purchaser of this class of commercial paper is bound to see whether or not there was statute authority to issue it; and upon reading the statute, claimed to confer the authority, he is not bound to do more. Finding that the statute recited gives ample authority, he has the right to act upon it.

Any other rule would be subversive of right and justice, and of the jurisprudence of this court, as established by a long and uniform series of decisions. The rule vigorously upholds, maintains and enforces a great principle of commercial honor of the highest importance to this country, composed, as it is, of separate State organizations. It gives confidence in the validity of inter-State transactions. To engraft upon this rule the modification sought in this suit, would so weaken its force as to make uncertain all transactions based upon statute authority.

## X.

**A conflict between the Federal and State Courts, upon the admissibility, competency and effect of evidence is not uncommon; and this court is not bound by the decision of the State Courts.**

*Gelpcke* v. *Dubuque*, 1 Wall., 206.
*Pine Grove* v. *Talcott*, 19 Wall., 666.
*Venice* v. *Murdock*, 92 U. S., 494.
*Warren Co.* v. *Marcy*, 97 U. S., 96.
*Roberts* v. *Bolles*, 101 U. S., 119.
*Oates* v. *National Bank*, 100 U. S., 246.

It is only where the *statute law* of a State prescribes the rule of evidence, that the Federal courts are bound to follow it.

*Ryan* v. *Bindley*, 1 Wall., 68.

The Supreme Court of Illinois, in the case of *Miller* v. *Goodwin*, declares no rule of evidence, and acts on no rule of evidence, peculiar to that State, or predicated on any statute law of that State. It simply found, *as a fact, from "the effect" of the evidence "then before it,"* that a certain *original journal, long before then lost or destroyed, still existed.* It found, *as a fact*, that the journal of the proceedings of the senate, made by the secretary of the senate in his official capacity, from the current minutes of the proceedings of that body, taken during the day, as its business progressed, made by the only person having any authority in the matter, *does not constitute a journal*, but remains simply "current minutes" until *copied* into a book, as stated in other parts of this brief. This is not even a declaration of a *rule* of *evidence.* It is simply the statement of the *finding* or *conclusion* of that court, from the testimony which it chose to hold admissible. It was not claimed by the court that there was any *statute law* prescribing what evidence was admissible to show that a supposed statute was not passed in conformity with the provisions of the constitution. The question decided did not involve the *construction* of a statute, but only the *existence* of one, and this is conceded to be one of *fact*, simply. Hence the decision of that case is of no binding authority on this court; and whatever deference is paid to it must be based on the supposed convincing force of its reasoning and conclusions.

We were neither parties nor privies to that case, and had no control over the litigation; and the decision of that

court does not preclude us from investigating the same question of fact, in another forum, or even in the same forum.

We have endeavored to show, that the finding of fact by the State court was, from the very nature and essence of the case, erroneous. That court is not endowed with creative power. It cannot, by its *fiat*, make something out of nothing. It cannot say, "Let there be light." It cannot say, after a journal has been absolutely lost or destroyed, "Let there be an original journal," with any such force and effect, that the Federal courts are compelled to respond, "And there *is* an original journal."

In the case of *Venice* v. *Murdock*, 92 U. S., 499, there was a statute authorizing the town authorities to borrow money to aid in the construction of a railroad, and to execute the bonds of the town therefor, *provided* they first obtained the written assent of two-thirds of the resident tax-payers of the town, and filed the same in the clerk's office of the county, together with the affidavit of at least two of the officers designated, to the effect that the persons giving their written assent composed two-thirds of the resident tax-payers of the town. A paper purporting to be the written assent of the proper number of resident tax-payers, to which was attached the requisite affidavit, was duly filed as required. The bonds were then issued under that authority.

The Supreme Court of New York, in a suit by a bondholder against the town, on bonds issued under the above authority, *held* that the burden of proof was upon the bondholder to show that in fact two-thirds of the resident tax-payers of the town had given their written assent, &c.

It was insisted that this was a *judicial construction* of a

*statute of that State by its highest court*, and so furnished a rule by which the Federal Courts must be guided.

But this court held that it was not even an *attempt at interpretation*; that it was but the assertion of a *general proposition*, and the court adds: "There is, therefore, be- "fore us, no such case of the *construction* of a State "statute by State courts, as requires us to yield our own "convictions of the right, and blindly follow the lead of "others, eminent as we freely concede they are."

See also, Olcott vs Supervisors, 16 Wall. 689 +

In *Gelpcke* v. *Dubuque*, the court say:

> We are not unmindful of the importance of uniformity in the decisions of this court and those of the highest local courts, giving *construction to the laws* and *constitutions* of their own States. It is the settled rule of this court in such cases to follow the decisions of the State courts. *But* there have been heretofore in the judicial history of this court, as doubtless there will hereafter be, many exceptional cases. *We shall never immolate truth, justice and the law, because a State tribunal has erected the altar and decreed the sacrifice.*

The Supreme Court of Illinois has, in *Miller* v. *Goodwin*, erected an altar and decreed the sacrifice thereon of the bonds in suit. To do this it was compelled to clearly immolate both truth and justice, as well as the facts, and also the rule of evidence declared by it in *Spangler* v. *Jacoby*. If this court would *hesitate* to follow the State court in such a holocaust, when giving a construction to the laws and constitution of the State, will it not even *refuse* to follow it when only passing upon the question of the competency of evidence?

It has been suggested that it would be an intolerable state of things if a document, purporting to be an act of the legislature, could be held to be a law in one case for one party, and not a law in another case for another party. * The question decided by the State Court "was not one of interpretation or construction. The meaning of no provision of the statute or Constitution was considered or declared."

But does the case at bar present a question coming very forcibly within this suggestion? The sole purpose of the act in dispute was to authorize certain specified localities to issue bonds in payment of stock to be subscribed for in a certain railroad company. While it is a public statute, in the sense that courts will take notice of it without its being plead specially, yet it is a local statute in its scope and operation, and one whose aggressive force was long since spent. The plaintiff claims that it was valid, and authorized the issuing of the bonds in suit. The defendant denies this. This court, if you please, holds with the plaintiff, and the State court with the defendant. The result would be that it would be a law for the parties who could sue in the Federal courts, and would not be a law for parties who could sue only in the State courts. Now it is submitted that such a state of things is not intolerable. It is in fact very common. It occurs in every case where this court takes a view different from the State court. The Illinois court holds, in cases where there is no question about statute authority to issue bonds, that, in order to make the bonds valid obligations in the hands of *any* body, *every requirement* of the statute, preliminary to the issuing of the bonds, must be complied with, as a condition precedent to the right to issue the bonds, notwithstanding the recitals may declare that the bonds are issued pursuant to and in compliance with the statute and a vote of the people. This court holds uniformly, that if there is valid statute authority, and the recitals in the bonds are as above stated, the bonds are valid in the hands of a *bona fide* holder. Neither court can enforce its view of the law upon the other; yet each court, for many years, has maintained its own view of the law, as above stated, and no trouble has resulted from it. Parties who hold the bonds and can come

into the Federal Courts to enforce them can collect them as valid obligations, while parties who hold them and are citizens of Illinois, and so cannot come into the Federal Courts, are denied a remedy, and the municipalities are able to successfully repudiate their solemn obligations to their own citizens.

It would seem that while this result is brought about in one case, because the courts differ upon the evidence offered as to the *existence* of a statute, and in the other as to the effect of the *recitals* in a bond, still the effect, as a conflict of opinion, is believed to be precisely the same; and no greater incongruity or inconvenience exists, than always follows in cases where the Federal courts differ with the State courts in their judgment of the law and the facts.

In all such cases this court has full power and authority to enforce its judgments, to compel the municipalities to levy and collect a tax to pay them, and all this, without the interference or assistance of the State authorities in the slightest degree. This is done constantly and is contemplated "by the framers of the constitution in providing for "the creation of an independent Federal judiciary." It is one of the functions, the performance of which this court cannot "abdicate."

It has also been suggested, that it would be an unseemly state of things, after the courts of Illinois have determined that a pretended statute of that State is not such, for the Federal courts, *with the same evidence before them*, to hold otherwise. If the answer to the previous suggestion is not deemed a sufficient answer to this, it certainly will be sufficent to say, that this case was not tried upon the same evidence as *Miller* v. *Goodwin*, if the evidence in that case is correctly stated in the opinion of

the court; and the findings in this case are based upon an entirely different state of facts.

## Conclusion.

*Ought the defense set up to a recovery on the bonds in suit to receive any favor in this court?*

The defense is based on the case of *Spangler* v. *Jacoby*, and is purely technical. It has nothing to commend itself to the moral sense. The defendant, as well as the plaintiff, acted with apparent sincerity and good faith upon the authority of the act of the legislature recited in the bonds, as a law in force. The defendant received, and still retains, the full benefits of the transaction. Its repudiation, now, of all its obligations so assumed, is simply shocking to all sense of justice.

The *equities* of the case, in favor of the plaintiff, and against the defense set up, and so remorselessly insisted upon, are as follows:

The law in question was duly enrolled—signed by the speakers of both houses of the legislature—approved by the governor—deposited in the office of the Secretary of State as a law in force—published by said secretary, with the requisite certificate, among the laws passed at the session of the legislature of 1857—*accepted* and *acted upon*, by the inhabitants of Ottawa in December, 1867, when they voted under it for a subscription to the capital stock of the railroad company, and authorized the issuing of the bonds in suit in payment therefor—*recognized* as a valid and existing law by the legislature of the State, in acts passed 27th March, 1869, and 20th April, 1869, referred to in the *Perkins* case, the latter of which was passed for the specific purpose of *amending* the act in question—*acted upon* by the duly authorized

officers of the town when, in obedience to the vote of the inhabitants, they subscribed for the stock in the railroad company, and in May, 1869, issued the bonds in suit in payment therefor—*acted upon* by the Secretary of State when he made his certificate of registration on the bonds—*taken judicial notice of and acted upon* by the Supreme Court of Illinois, at its September term, 1870, in the case of *Dunnovan* v. *Green*, as a law in force, in a direct proceeding to enjoin the collection of taxes levied to pay interest on bonds issued under the authority of said act—and again, by the same court, at its September term, 1871, in the case of *Force* v. *Town of Batavia*, in a direct proceeding to enjoin the delivery of bonds voted by the defendant, under the authority of said act—*acquiesced* in and recognized by the people of the State of Illinois, its officers and courts for more than *fourteen years* after its publication, and for upwards of three years after the bonds in suit were issued and placed on the market—and *acted upon* by the general public, when dealing in said bonds under all the sanctions and assurances aforesaid.

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In view of all these equities and facts, this court it most earnestly besought not to extend the rule laid down in *Spangler* v. *Jacoby*, even to the breadth of a hair, but on the contrary, to hold the defendant technically and firmly within its strict limits, and let the presumptions in favor of the act in question *sustain* it as a law in force, now that the original journals are lost, and cannot be produced in evidence.

SANFORD B. PERRY,
*Attorney for Plaintiff.*

SUPREME COURT U.S.
FILED
APR 18 1882
JAMES H. McKENNEY, Clerk.

# UNITED STATES SUPREME COURT.

**No. 235.**

OCTOBER TERM, A. D. 1881.

THE AMOSKEAG NATIONAL BANK,
PLAINTIFF IN ERROR,

vs.

THE TOWN OF OTTAWA,
DEFENDANT IN ERROR.

## REPLY TO SUGGESTIONS BY JUDGE DICKEY.

By SANFORD B. PERRY,
FOR PLAINTIFF IN ERROR.

Beach, Barnard & Co., Legal Printers, 104 Randolph St., Chicago.

# UNITED STATES SUPREME COURT,

**No. 235.**

OCTOBER TERM, A. D. 1881.

THE AMOSKEAG NATIONAL BANK,
PLAINTIFF IN ERROR,

vs.

THE TOWN OF OTTAWA,
DEFENDANT IN ERROR.

## Review of Judge Dickey's Suggestions.

The references herein made to the "Findings" are to the numbers as given in the Amoskeag National Bank Record.

There are many things in the "suggestions" by Judge DICKEY to which the attention of the court should be called. It is especially important that the court be not misled by the great freedom with which the facts of this case, as shown by the findings, are treated. It is due to the court that we take some notice of the ingenious methods adopted to lead the mind of the court from the true issues in the case.

It is stated (p. 5) that the plaintiff relies for power to issue the bonds in suit, on the act of 18th Feby., 1857 (with other acts): that the power under that act depends "upon whether the same was passed by the senate on a "vote taken by ayes and noes, and so entered upon the "journal."

This is not a correct statement of the issue made. It is, indeed, quite unlike that. The presumptions are all in favor of the act, and sustain it as a law in force.

These presumptions can be overcome only by showing, by the *original journal* of the senate, that on the final passage of the bill, the vote was *not* taken by ayes and noes, entered on the journal; or that the bill, in and by such a vote so entered, did *not* receive the affirmative vote of a majority of all the members elect.

The burden of making this proof is upon the *defendant*. The plaintiff is not required to show that the bill *was* so passed; the presumptions in favor of the bill are sufficient for it. But the defendant must show that it was *not* so passed, if it would succeed.

Under this issue, the sole contention in the case, so far as it depends on the existence or non-existence of that statute, is this: Is there any evidence in the case, as shown by the findings, competent and legitimate to overthrow these presumptions? The plaintiff insists that there is not: that there is nothing approximating to such evidence.

If Judge DICKEY had more carefully considered this matter he would have stated his proposition, as follows:

"The act of 18th February, 1857, giving on its face "full power to issue the bonds in suit: all the presump- "tions being in its favor as a law in force; and the bur-

"den of proof to overcome and rebut these presumptions, "being on the defendant, if it would defeat the law, *it* "*follows*, upon the authority of *Spangler* v. *Jacoby*, that "unless the defendant can show affirmatively, by the "*original journal* of the senate, that on the final passage "of the bill, the vote was *not* taken by ayes and noes, en- "tered on the journal; or that the bill, in and by such a "vote so entered, did *not* receive the affirmative vote of "a majority of all the members elect, the law must stand, "and the defense must fail."

## Printed Copy of the Journal.

An elaborate effort is made by Judge DICKEY, to show that the *printed copy* of the legislative journals of this State is competent and legitimate evidence to overthrow the presumptions in favor of an enrolled law, duly signed by the speakers of both houses of the general assembly, approved by the governor, and deposited with, and published by, the secretary of State, as a law in force. This is the first effort, in this direction, which has been attempted since this contention arose—now covering a period of over thirty years. That it should fail, may not be a matter of surprise. I have looked into the citations made in support of this proposition, and do not find that they sustain it, when considered in connection with the statutes of Illinois, and the decisions of its Supreme court.

To show that the citations do not sustain the proposition, it is not necessary to controvert the doctrine that, under the laws and customs of England, the "Gazette" is evidence of all matters therein printed relating to the State; or that a printed copy of a legislative journal in New York, "proved by the clerk," is evidence in a suit for libel, to show what transpired in the legislature, as was

held in *Root* v. *King*, 7 Cow.; or that a printed document of a public character, submitted to congress by the president in his official capacity, is admissible in evidence when introduced "*collaterally*, and not as to a matter of fact in "issue," as was held in *Radcliff* v. *Ins. Co.*, 7 Johns; or that the contents of any record of a judicial court, or of a record of a public nature, in books *required by law to be kept*, may be proved by an *examined copy*, as is stated in 1st Greenl. Ev., §91; or that a printed volume of State papers, published under an act of congress, *authenticated* as required by the act, is evidence, as was held in *Watkins* v. *Holman*, 16 Peters, 55; or that the *journals* (not *printed copies*) of congress, and of the State legislatures, are evidence, as was remarked, by way of illustration, in the case last named; or that a record (not a printed copy of it), kept by a person employed by the United States signal service, whose public and official duty it was to record truly the facts therein stated, is competent evidence. (99 U.S. 666)

This is the class of authorities cited in support of the proposition that the printed copies of the legislative journals of Illinois are competent evidence. They do not seem to be applicable, or to support the proposition either upon principle or authority.

It is true that the constitution required that the journals be published, but it did not direct how, or by whom, or under what sanction, or give any value to them as evidence. This was, as a matter of course, left to the legislature. The act of 14th Feby. 1831, required the Secretary of State "to superintend the printing of the laws, "acts and resolutions, carefully comparing the printed "copies with the original laws and rolls deposited in his "office, correcting all errors that may appear in such

"printed copies; and to make and cause to be printed, at "the end of such printed copy, * * his cer- "tificate that the acts and resolutions so printed are "exact copies of the rolls in his office." The law of 1836 required the secretary of State to superintend the prin ing of the journals, but it did not require him to "carefully compare" the printed copies with the original journals deposited in his office, "correcting all errors" that may appear in such printed copies, or to print at the end of the printed copy of the journal, his certificate that the same is an "exact" copy of the journal on file in his office. The distinction is marked, and therein lies the difference between the printed statutes and the printed journals as evidence. One is evidence *because* it was carefully compared with the original to see that it was correctly done, and the other is not evidence because not printed with the requisite care. That this is the true construction is shown by the fact that it was not until by the act of 1874 that the printed copy of the journal was made evidence, and then only when there is appended to it a certificate of the secretary of State that the same is a true copy of the journal on file in his office. If the printed copy of the journal was evidence *prior* to 1874, that statute imposed upon the secretary of State a new, onerous and useless labor. While the legislature did not take the view of this matter now taken by Judge Dickey, it *did* take the view universally prevalent in Illinois up to the time the suggestions under review were written.

The Supreme court of Illinois, in 1867, in *Ill. Cent. R. R.* v. *Wren*, when offered the printed copy of the journal as evidence to impeach a law, declared that it was not aware of any law that made the printed copy evidence of the contents of the *original*.

It is true that the Supreme court of Illinois, at the September term, 1873 (not *1872*, as Judge DICKEY, by mistake, states it), in *Happel* v. *Brethauer*, in passing upon a case where the parties had *stipulated* that a certain act had not been passed in conformity to the constitution, and in refusing to act upon the *stipulation*, is made by the report of the case to say, that the *fact* that the constitution had not been complied with must be shown either by the *printed* journals or the certificate of the secretary of State, the custodian of the legislative proceedings.

This is the only reported utterance of any department of the government giving any sanction to the proposition that the printed copies of the journal were ever made, or considered to be, evidence, prior to the act of 1874. It is very clear that this was a *lapsus pennae*. It is susceptible of absolute demonstration that Judge THORNTON, to whom the expression is attributed, did not purposely use it, and did not intend to convey the idea that the printed copy of the journal is competent evidence of the contents of the original.

In the same volume of reports in which the *Happel-Brethauer* case is published, is the celebrated case of *Miller* v. *Goodwin*, so much relied on by the defendant, decided at the same September term of the court, 1873. The great effort of the court in that case was to *create* an *original* journal out of the "well bound book," as has been shown by the briefs heretofore filed herein. The court did not for a moment recognize the claim that the presumptions in favor of a law could be overthrown by any *grade* or *degree* of *secondary* evidence. The *original* journal of the senate, made by its clerk, and deposited with the secretary of State, had been *lost*. This fact appears to have been recognized. It was believed to be

necessary to have an original journal in order to defeat the law. Hence the great effort and labor to create one, *from the evidence then before the court*, out of the "well bound "book." Now, if it actually lay in the mind of Judge THORNTON, or of any of his associates, that the *printed* copy of the journal was evidence of the contents of the original, the court would certainly have adopted the theory that secondary evidence was admissible, and that this printed copy was all that was required. This would have been a short way out of the dilemma. The fact, that under the pressing needs and circumstances of that case the court did not adopt this way out of the difficulty in which the defendant found itself, shows conclusively that the court did not and does not hold the printed copy to be evidence of any grade or for any purpose. If that court, under the great temptation which beset it, did not deem that it had the power to take that step, it is presumed that this court, in view of all the facts, will also decline.

## History of the Journals.

What purports to be a *history* of the journals of the Illinois legislature is given. What is history? Webster defines it: "An account of facts." Would it be permissible to write such a history, to be used in a case pending in this court, and to refer for the facts, to any sources whatever, other than the record in the case, and the constitution and statutes of Illinois? Any statement as of a fact, made by counsel, and not found in these sources, is wholly gratuitous, and I am sure will be ignored by the court. This history, *as shown by the record*, is very brief, and is all contained in the fifth, eighth, and ninth findings.

This case involves a very large amount of money, and the fortunes, to a large extent, of a great many people. Hence the effort of counsel to present the case as fully, from every point of view, as they are able. The labor of examining it, and all the briefs filed, will be considerable; but that nothing, deemed by the counsel for the plaintiffs important, be overlooked, it is perhaps proper to call the attention of the court to some of the alleged history of the journals, contained in Judge DICKEY's suggestions, which does not seem to be sustained by the findings or statutes.

1. It does not appear, that since 1849 (p. 15), "the "proceedings of each house have been recorded in books "as permanent records, and *deposited* in the office of the "secretary of State." It was so done, between 1836 and 1849, under the direction of the act of 1836. It appears only, that since 1849, the original journals, as made by the secretary of the senate and clerk of the house, "made "up under the immediate direction of the senate and "house," and which, and which only, contain the proceedings of each house, have been *deposited* with the secretary of State. This is a *material distinction*, because, it is only from "papers, writings and documents *legally de-* "*posited* in the office of the secretary of State," that he can certify copies which can "be received in evidence in the "same manner, and with like effect *as the originals.*" (Act of 9th March, 1869.)

It does not appear that there are, in the office of the Secretary of State, *deposited* since 1849, any books of any kind in which the legislative journals, kept since 1849, have been *recorded.* There is nothing there, in the shape of books, relating to this subject, except the "well bound book," made in the manner described in the fifth finding, under no official sanction whatever.

2. It does not appear that there ever was, at any time, any such thing as the "*first draft of the journal.*" This is a favorite phrase of Judge DICKEY's, oft repeated, evidently with the intent to fix it in the mind of the court, with the hope that the court will come to believe that there *was* such a document. The findings and common custom refute this idea. When the journal was made up by the secretary of the senate from the minutes of the proceedings of the day's session, it was *the* journal—not a *draft*, but a journal, an *original* journal. There is no warrant, either in fact, or law, or morals, for the use of that phrase.

3. Assuming that the "first draft" of Judge DICKEY, is in fact the journal of the senate described in the fifth finding, it is a mistake to say (p. 15,) that "until "1873 no provision of law was ever made for the "preservation of" the original. It was provided, as follows, by the

*Act* of *14 Feb'y, 1831.*

§ 2. All public acts, laws and resolutions that have been, or shall be passed by the general assembly of this State, shall be carefully deposited in the office of the secretary of State. And the secretary of State is hereby charged with the safe keeping of said office, and all laws, acts, resolutions and *records deposited, or which shall hereafter be deposited, therein.*

Rev. Stat. of 1833, p. 568.
Rev. Stat. of 1845, ch. 96, § 7, p. 492.

*Act of 16 Jan'y, 1836.*

§ 2. The secretary of the Senate and clerk of the House * * * shall, within ten days after the adjourn-

ment of each session of the general assembly, *deposit the original journal*, kept by them as aforesaid, *with the secretary of State.*

Stat. Laws of 1839, p. 551.
Rev. Stat. of 1845, ch. 84, § 3, p. 422.
See also Rev. Stat. 1845, ch. 96, § 8, p. 492.

And these "original journals," when so deposited with the secretary of State for "*safe keeping*" become a part of the *records* of his office, and may be certified as such under the seal of State.

Rev. Stat. of 1845, ch. 96, § 5, p. 491.
*Spangler* v. *Jacoby*, 14 Ill., 299.

So it appears from the above, that *full* provision was made as early as 1831, for the "safe keeping," the "preservation" of the original journals. If the secretary of State did not obey the law, if he did not safely keep and preserve the original journals, it would not seem that his neglect or malfeasance could afford ground for making that evidence which would not be evidence if he did his duty. To promote *justice*, courts will sometimes go a great way to find competent evidence,—but to promote *repudiation*, they have not been so vigilant.

4. Again it is said (p. 15), that the journals "have by "usage, from the organization of the State until the pres- "ent time, and *by provisions of law*, been required *to be* "*copied into books as a permanent record of the journal.*"

I submit that it does not so appear, either from the findings or from the statutes.

It appears, that from and after the act of 16th Jan'y, 1836, to the act of 12th Feb'y, 1849, the journals were required to be *kept* in "well bound books"; and the twelfth finding shows that the journals, during that pe-

riod, were so kept, and deposited with the secretary of State by the officers of the legislature.

It also appears that from and after the act of 12th Feb'y, 1849, and in pursuance thereof, the original journals made by the officers of the legislature and deposited with the secretary of State, were required to be *copied into a well-bound book*, to be furnished by the secretary of State, by a contractor for that purpose. It is shown by the fifth finding that the journals of 1857 were not copied by the contractor for that purpose, but by a person not acting even under the obligations of a contract. The statute did not designate the book into which the journals were so required to be copied, as a "*record*" of the journal, or as the "journal record," or give it any character or office whatever, and there is no warrant of law or fact to use the word record in connection with it.

5. The question is asked (p. 23): "Will any one be "so bold as to say, that when the constitution of 1848 and "the act of 1849 provided that these *records* should be "*prepared* by a *copyist* employed by the secretary of "State, it was intended that they should be regarded as "*less authentic* sources of information than when prepared "by the *other* mode"? that is, (12th finding) by the secretary of the senate and clerk of the house, and their respective assistants, as the original journals, or by the copyists appointed by the senate or house for that purpose, and by them *deposited* with the secretary of State *as the original journals.*

It does not appear either from the constitution of 1848, or the act of 1849, that there is any provision providing that the contractor for *copying* should *prepare any records* whatever; it is only provided that he should *copy* them.

It is submitted that it requires *some* boldness to predicate such a statement on that constitution and statute. Eliminate that, and the writer dare say that it was *not* intended that the copy so made should be regarded as an authentic source of information as to the contents of the original journals. The writer also dare say that the journals prepared "by the other mode" are not only more authentic sources of information, but that they were the ONLY sources of information known to the law, prior to the act of 1874, which made the printed copy of the journals evidence when duly authenticated as therein prescribed; that they were the only source deemed by the legislature to exist, as is clearly shown by the act repealing the statute which authorized the copy to be made in the well bound book.

Since the example is set, of giving history not based on the record, it may not be improper to state, by way of illustrating this point, that at the trial of this case, in the court below, a question was put to the distinguished counsel for the defendant. "Suppose, judge, that the original "journal of the senate, as kept by the secretary of the "senate, and by him deposited in the office of the sec-"retary of State, should be found and produced here on "the trial, and that in fact it should show that the act in "question was passed in full conformity to the provisions "of the constitution, which would control, that journal, "or the well bound book?" The logic of the counsel's position compelled him to claim that the well bound book would control!

6. It would *seem* to be asserted, (p. 23) that no one of the Illinois cases was decided until after "the original *draft* of the journal *first made*, &c." had been lost or destroyed; and that therefore there was no source of in-

formation as to the contents of the journal, upon which the court could adjudicate, except the "well bound book." There certainly is nothing in *Spangler* v. *Jacoby* on which to base this assertion. That case states that, "a "certified copy of the journals of both houses, having "reference to the act in question, appears in the bill of "exceptions." This does not mean a certified copy *from* a copy, but from the *originals*. The court there treats the evidence as a truly certified transcript from the journals which are "made up under the immediate direc- "tion of the house." It is that journal, and that only, which the court refers to in its opinion.

7. On p. 19 of the suggestions it is stated, that the 7th (5th) finding is, "that in pursuance of the act of 1869 "(1849?) the secretary of State did provide the proper "books, and cause the said journal of the senate to be "*kept* therein," &c. This quotation makes a very material change in this finding of fact; and while the change makes the finding tend to support the defendants' claim, it is not quite just to present it as a part of the "history" of the journals. The finding, as contained in the *record*, states, that "the secretary of State did provide the proper "books, and cause the said journal of the senate to be "*copied* therein," &c.

The statutes herein referred to, and not quoted at length, are given in full in the first seven pages of my original brief.

Respectfully submitted,

SANFORD B. PERRY.

IN THE

# SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1881.

AUGUSTUS T. POST, *Plaintiff in Error*,

*vs.*

BOARD OF SUPERVISORS OF KENDALL COUNTY,
*Defendants in Error;*

AND

THE AMOSKEAG NATIONAL BANK, *Plaintiff in Error*,

*vs.*

THE TOWN OF OTTAWA, *Defendant in Error.*

## BRIEF FOR PLAINTIFFS,

BY

MILTON HAY AND D. T. LITTLER.

SPRINGFIELD, ILL.:
SPRINGFIELD JOURNAL COMPANY PRINT.
1882.

# SUPREME COURT OF UNITED STATES.

## OCTOBER TERM, 1881.

**AUGUSTUS T. POST,**

*vs.*

**THE COUNTY OF KENDALL,**

**AND**

**AMOSKEAG NATIONAL BANK,**

*vs.*

**~~SOUTH~~ OTTAWA.**

*Error to the Northern District of Illinois.*

The following are the several statutes involved in these cases relating to the power:

"An act authorizing certain Cities, Counties, Incorporated Towns and Townships, to subscribe to the stock of certain Railroads.

"SECTION 1. *Be it enacted by the People of the State of Illinois, represented in the General Assembly*, That any city, county, incorporated town, or any township,

"now or hereafter organized under the township organ-
"ization laws, which may be situated on or near the
"route of the Ottawa, Oswego & Fox River Railroad,
"or of the Chicago, Amboy & Upper Mississippi Rail-
"road, or of the Joliet & Mendota Division of the Joliet
"& Terre Haute Railroad, as the same may have here-
"tofore or may hereafter be surveyed and located, may
"become subscribers to the stock of any such road; and
"may issue bonds for the amount of such stock so sub-
"scribed, with coupons for interest thereto attached,
"under such limitations and restrictions, and on such
"conditions as they may choose, and the directors of
"said company may approve; the proposition for said
"subscription having been first submitted to the inhab-
"itants of such city, county, town or township, and ap-
"proved by them. And upon application of any fifty
"voters of any city, county, incorporated town or town-
"ship, as aforesaid, specifying the amount to be sub-
"scribed, and the conditions of said subscription, it
"shall be the duty of the clerk of such city, town, county
"or township, immediately to call an election, in the
"same manner that other elections for said city, county,
"town or township are called, for the purpose of deter-
"mining whether said city, county, township or town
"will subscribe to the stock of said road, and if a ma-
"jority of said voters shall be "for subscription," then
"the County Court, or Board of Supervisors having
"jurisdiction over county matters in said county, or the
"corporate authorities of said city or town, or the Su-
"pervisors and Town Clerk of such township so voting,
"shall cause said subscription to be made, and upon its
"acceptance by the directors of said company, shall
"cause bonds to be issued in conformity with said vote,
"which bonds shall in no case bear a higher rate of in-
"terest than ten per cent. per annum, and shall not be

"of less denomination than one thousand dollars, and "shall be accepted by said company at their par value.

"2. Any township in Kendall county, and the town "ship of Plainfield, in Will county, shall have like "power to subscribe for the stock to any railroad now "or hereafter located through said township, and issue "bonds therefor in the same manner as provided in sec- "tion first, or to vote a sum, not exceeding five thousand "dollars, to pay damages for right of way through "said town, for any such railroad.

"3. This act shall be in force from and after its pas- "sage, and shall be liberally construed for the purposes "expressed therein, and shall be held to be a public "act.

"4. It shall be the duty of the proper authorities of "any city, incorporated town, county or township issu- "ing bonds as aforesaid, to make all necessary arrange- "ments, and provide for the prompt payment of all "interest and other liabilities accruing thereon, and to "levy such taxes as may be necessary therefor, as other "taxes are levied by them.

"Approved Feb. 18th, 1857."

Laws of Illinois, 1857, pages 225-6.

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"An act to amend an act entitled 'An act to incorpo- "rate the Ottawa, Oswego & Fox River Valley Railroad "Company.'

"SECTION 1. *Be it enacted by the People of the State "of Illinois, represented in the General Assembly*, That "the Charter of the Ottawa, Oswego & Fox River Val- "ley Railroad, be and the same is hereby amended as

"to authorize said company to build its road from the "town of Wenona, in the County of Marshall, in a "southwesterly direction, through the Counties of "Marshall, Woodford, and Tazewell, to the City of "Peoria, in the County of Peoria.

"2. That any city, county, town, or township, near to "or through which said railroad is now or may here- "after be located, is hereby authorized to subscribe to "the capital stock of said railroad, upon the terms and "conditions prescribed in an act entitled 'An act to "authorize certain cities, counties, towns and townships "to subscribe to the capital stock of certain railroads,' "in force February 18, 1857.

"3. This act shall be deemed a public act, and be in "force from and after its passage. Approved March 27, "1869."

Laws of Illinois, 1869, volume 3, page 329.

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An Act to amend an act entitled "An act authorizing certain cities, counties, towns and townships to subscribe to the stock of certain railroads," in force February 18, 1857.

"SECTION 1. *Be it enacted by the People of the State of "Illinois, represented in the General Assembly*, That in "addition to the cities, counties, towns and townships "authorized by the said act to which this is an amend- "ment, to subscribe to the capital stock of the Ottawa, "Oswego and Fox River Valley Railroad, the following "portions of cities, counties, towns and townships be "and are hereby authorized to subscribe to the capital "stock of said Ottawa, Oswego and Fox River Valley "Railroad, in manner as provided in said act, except as

"hereinafter provided: The east half of the town of "Farm Ridge, the west half of the town of Grand "Rapids, both in the county of LaSalle; all that portion "of the town of Rutland, in said county, lying in town- "ship thirty-four north, range four east of the third "principal meridian; all that portion of the town of "Seneca, in said county, described as follows, viz: the "east half of township thirty-five north, range four "east of the third principal meridian, together with all "that portion of said town of Seneca lying in township "thirty-five north, range five east of the third principal "meridian; all that portion of the town of Mission "lying north of the north line of sections twenty-five, "twenty-six, twenty-seven, twenty-eight and twenty- "nine, in township thirty-five north, range five east of "the third principal meridian; all that portion of the "town of Aurora, in the county of Kane, lying west of "the east channel of Fox River; all that portion of the "town of Batavia, in said county of Kane, lying west of "the east channel of Fox river; all that portion of said "town of Aurora lying east of the east channel of Fox "river; all that portion of said town of Batavia lying "east of the east channel of Fox river.

"§ 2. Upon the application of any fifty voters, resid- "ing in any of said portions of said cities, counties, towns "or townships, specifying the amount to be subscribed "and the terms of subscription, it shall be the duty of "the clerk of the city, county, town or township of "which the said portion so applying forms a part, to "call an election of the legal voters of said portion of "city, county, town or township, in like manner as is "provided in the act to which this is an amendment: "*Provided*, that at least thirty days' notice of such "election shall be given prior to holding the same.

"§ 3. It shall be the duty of the proper authorities "of any of said cities, counties, towns or townships, "upon a vote being carried 'For subscription,' as pro- "vided by the act aforesaid, by the legal voters of any "of the said portions of cities, counties, towns or town- "ships, for the amount voted for; to deliver the same "to said railroad company, at par, for its stock; to make "all necessary arrangements for the prompt payment "of the same, principal and interest, and to levy the "necessary taxes therefor upon the particular portion "so voting, as aforesaid.

"§ 4. All bonds issued under this act, and to be "hereafter issued under the act to which this is an "amendment, may be issued in sums of from one hun- "dred dollars to one thousand dollars.

"§ 5. This act shall be a public act, and shall be in "force from and after its passage.

"In force April 20, 1869."

Laws of Illinois, 1869, vol. 3, page 362.

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An Act to authorize the Counties of Woodford, LaSalle and Livingston, and the townships, cities, incorporated towns and corporations in said counties, to subscribe to the capital stock of any railroad company that now is or hereafter may be incorporated in the State of Illinois.

"SECTION 1. *Be it enacted by the People of the State of "Illinois, represented in the General Assembly*, That the "Counties of Woodford, LaSalle and Livingston, and "the townships, cities, incorporated towns and corpora- "tions in said counties, that now are or hereafter may "be organized in said counties, may become subscribers

"to the capital stock of any railroad that now is or "hereafter may be incorporated in this State, and may "issue bonds for the amount of such stock so sub- "scribed with coupons for interest thereto attached "under such limitations and restrictions and on such "conditions as to them may seem right for the best "interest of said counties, townships, cities, incorpo- "rated town or other corporation, any, all or either of "them, and the directors of said railroad company may "approve of the proposition for any such subscription, "the same having first been submitted to the legal "voters of such county, township, city, incorporated "town or other corporation, as aforesaid, and approved "by a majority of said legal voters, who may vote upon "the question and upon the application of twenty legal "voters and tax payers of any county, township, city, "incorporated town, or of three members of any corpo- "ration, as aforesaid, specifying the amount to be sub- "scribed; said amount not to exceed the sum of one "hundred thousand dollars for any one such county, "township, city, incorporated town or other corpora- "tion, to be subscribed for any one railroad company, "(and the amount that any corporation may vote to "subscribe shall be left to said corporation, and the "railroad company in which said corporation takes "stock,) and the condition of said subscription shall be "set forth in said application, and it shall be the duty "of the Clerk of any such county, township, city, incor- "porated town, or other corporation, immediately to "call an election by posting up notice at least twenty "days, in each township or voting place, in said county, "if the vote is to be taken by a county, or if by a town- "ship, then by the clerk of said township, in three of "the most public places in said township; or if by a city, "at three of the most public places in said city; or if by "an incorporated town, at three of the most public

"places in said incorporated town; or if by a corpora-
"tion, then at the usual places of holding elections in
"the State for the election of their corporation officers.
"Said election shall be held for the purpose of deter-
"mining whether said county, township, city, incorpo-
"rated town or corporation shall subscribe to the stock
"of the railroad company named in said call and
"notices, and if a majority of said voters, voting at said
"election, shall be for subscription, then the County
"Court or Board of Supervisors, having jurisdiction
"over the county matters of said county, or the corpo-
"rate authorities of such city, incorporated town, or
"supervision of such township, or the president of such
"corporation shall make or cause to be made, said sub-
"scription to said capital stock of said railroad com-
"pany, and upon said subscription, so voted, being ac-
"cepted or received by the directors of said railroad
"company, shall cause bonds to be issued in compliance
"with said vote, which bonds shall in no case bear a
"higher rate of interest than ten per cent. per annum,
"and said interest shall be paid out of the treasury of
"the county in which any of the said townships, city,
"incorporated towns or corporation shall be located;
"and said bonds shall not be for a less amount than
"one hundred dollars, each of which said bonds may
"run for a term of years not exceeding twenty; *Pro-*
"*vided*, each county, township, city, incorporated town
"or corporation, may by their votes determine on what
"part of said railroad their stock, so by them voted and
"subscribed, shall be expended; and said bonds shall
"be accepted by said railroad company at their face or
"at par value.

"§ 5. *It is further enacted*, That no mistake in the
"giving of the notice, or in the canvass or return of
"votes, or in the issuing of the bonds, shall not in any

"way invalidate the said bonds, so issued: *Provided*, "that there is a majority of the voters at such election "in favor of such subscription.

"§ 6. This act shall be deemed a public act, and shall "take effect from and after its passage.

"Approved March 6, 1867."

Laws of Illinois, 1857, Vol. 1, page 866.

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AMENDATORY ACT.

[*Sess.* (*Second*) *Laws Nov.* 6, 1849, *p.* 28.]

"SECTION 1. That whenever the citizens of any city "or county in this State, are desirous that said city or "county should subscribe for stock in any railroad "company already organized or incorporated, or here-"after to be organized or incorporated under any law of "this State, such city or county may, and are hereby "authorized to purchase or subscribe for shares of the "capital stock in any such company, in any sum not ex-"ceeding one hundred thousand dollars for each of "such cities or counties; and the stock so subscribed for "or purchased, shall be under the control of the County "Court of the county or common council of the city "making such subscription or purchase, in all respects "as stock owned by individuals."

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A portion of section 7, act of April 16th, 1869, reads as follows:

"And it shall not be lawful to register any bonds "under the provisions of this act, or to receive any of

"the benefits or advantages to be derived from this act "until after the railroad in aid of the construction of "which the debt was incurred shall have been comple- "ted near to or in such county, township, city, or town, "and cars shall have run thereon, and none of the "benefits, advantages, or provisions of this act shall "apply to any debt unless the subscription or donation "creating such debt was first submitted to an election "of the legal voters of said county, township, city, or "town under the provisions of the laws of this State, "and a majority of the legal voters living in said county, "township, city, or town were in favor of such aid, &c. "And the presiding judge of the County Court, or Su- "pervisor of the township, or the chief executive officer "of the city or town that shall have issued bonds to "any railway or railways, immediately upon the com- "pletion of the same near to, into, or through such "county, township, city, or town as may have been "agreed upon, and the running of the cars thereon, shall "*certify under oath that all the preliminary conditions of* "*this act required to be done to authorize the registration of* "*such bonds, and to entitle them to the benefits of this act* "*have been complied with, and shall transmit the same to* "*the State Auditor*," &c.

Constitution and Laws relating to the Journal.

*Constitution of* 1818, *Art.* 2, *Sec.* 8:

Each house shall keep a journal of its proceedings, which shall be published.

This provision is contained in the Constitution of 1848 and 1870.

*Act of* 14*th January*, 1827:

There shall be printed, at the close of each session of the General Assembly, five hundred copies of the *Jour-*

*nals of each house;* for the printing, folding and stitching of which the *General Assembly shall contract.*

Rev. Laws of 1833, p. 424.

*Act of 14th of Feb.*, 1831:

§ 3. The Secretary of State is hereby authorized and required to cause to be made out true and accurate copies of all laws, acts and resolutions of the General Assembly, which may be ordered by the said General Assembly to be printed; and such copies so made out he shall deliver to the person authorized to print the same. And the Secretary of State shall likewise superintend the printing of such laws, acts and resolutions, carefully comparing the printed copies with the original laws and rolls deposited in his office, correcting all errors that may appear in such printed copies; and shall make and cause to be printed, at the end of such printed copy * * his certificate that the acts and resolutions so printed are exact copies of the rolls in his office.

*Act of 24th January*, 1835:

§ 1. All laws, journals, &c., &c., shall be given to the public printer hereafter to be elected by the joint ballot of the two houses of the legislature.

§ 4. Printed copies of the journals shall be furnished within twelve days after the adjournment of the legislature: *provided*, that the *clerks* of the *two houses shall have furnished the public printer, every morning, with the proceedings of the preceding day.*

§ 6. That it shall be the duty of the Secretary of State to *examine the printing of all laws, and see that they are correctly done.*

Statute Laws of 1839, p. 549.

*Act of 16th January*, 1836:

§ 1. The Secretary of State shall hereafter superintend the printing of the journals.

§ 2. The journal of each house of the General Assembly shall hereafter be kept in well-bound books. The *Secretary* of the *Senate*, and the *Clerk* of the *House of Representatives*, shall furnish *to the public printer, every morning during each session* of the General Assembly, a *copy of the journal* kept by them respectively; of the day preceding the last day's journal; and the said secretary and clerk shall, within ten days after the adjournment of each session of the General Assembly, deposit the *original journal* kept by them as aforesaid, with the Secretary of State.

Statute Laws of 1839, p. 551.

*Constitution of* 1848:

The General Assembly shall provide by law that the * * * *copying, printing*, binding and distributing the laws and journals shall *be let by contract to the lowest*

Chap. 96, Rev. Stat. of 1845 (continued from Rev. of 1833):

"Sec. 7. All public acts, laws and resolutions, that have been, or shall be, passed by the General Assembly of this State, shall be carefully deposited in the office of the Secretary of State; and the Secretary of State is hereby charged with the safe keeping of said office, *and all laws, acts, resolutions and records deposited, or which shall hereafter be deposited therein.*"

This was a provision of the Rev. Laws of 1833, and has been continued in all revisions of the Statutes to the present time. (See Rev. Laws of 1874, Chap. 124, Sec. 3.)

*Act of 25th February*, 1867:

§ 1. All the public *laws* of the State of Illinois, to be published hereafter, shall be duly certified to by the

Secretary of State as correct copies of said laws as enrolled in the office of said Secretary of State, which certificate shall be published with the same, and *without such certificate no publication shall be received as evidence of the existence of such laws in any court of law or equity in this State.*

Gross' Stat., Ed. of 1869, p. 417.

*Act of 9th March*, 1869:

§ 1. Copies of all bonds, papers, writings and documents *legally deposited* in the office of the Secretary of State, when certified by the Secretary of State, and authenticated by the seal of his office, shall be received in the same manner and with like effect *as the originals.*

1 Gross' Stat., Ed. of 1869, p. 681.

*Act of 20th March*, 1869:

§ 1. The *copying* of the laws, *journals*, etc., of each General Assembly shall be done under the personal supervision of the Secretary of State, and such *copies* shall be *carefully compared with the originals* in his office before being printed, and in no case shall he permit the originals to be taken out of his office.

1 Gross' Stat., Ed. of 1869, p. 417.

*Act of 29th April*, 1873:

§ 1. Provides for advertising for proposals for copying laws, journals, etc.

The contract to be awarded to lowest responsible bidder, etc.

§ 3. The copying of all laws and journals shall be done in the State House, under the *personal supervision of the Secretary of State*, and such copies shall be *carefully compared with the original in his office*, before being printed.

§ 8. The *original journals* which may be prepared by the *Secretary of the Senate*, and the *Clerk of the House of Representatives*, shall be securely bound in books, and filed in the office of the Secretary of State.

§ 9. There shall be copied for the use of the public printer, one copy of the journals of each house.

3 Vol. Gross' Stat., p. 67.

*Rev. Stat. of* 1874, *Ch.* 124, *p.* 988:

§ 8. In the publication of the laws of this State, or the resolutions, or *journals of the General Assembly*, the Secretary of State shall cause to be published, in each volume, a *general certificate*, to the effect that the same as contained in such volume are *true copies* of the laws, resolutions, or journals of the General Assembly, as the case may be, on file in his office; and each volume, *so certified*, shall be received as evidence in all courts and places.

*Rev. Stat. of* 1845, *Ch.* 62, *p.* 338:

§ 5. It shall be the duty of the Governor of this State, so soon as the acts of the General Assembly of this State, after each and every session thereof shall have been published, to transmit, free of postage, to the executive of each State and Territory of the United States, * * * three copies of the acts of the General Assembly of Illinois, at such session, etc.

That the following acts and parts of acts are hereby repealed:

Section 8. "An act for revising and consolidating the "general statutes of the State of Illinois," approved March 3d, 1845, except chapter 104, entitled 'Trespass.'

Revised Statutes of 1874, page 1012, section 108, of the same repealing statute, repeals, in express terms, the "well bound book act." It is as follows:

"An act to provide for copying and distributing the "laws and journals, and for other purposes."

Approved February 12, 1849.

# AUGUSTUS T. POST,

*vs.*

# THE COUNTY OF KENDALL,

AND

# AMOSKEAG NATIONAL BANK,

*vs.*

# ~~SOUTH~~ OTTAWA.

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*Error to the Northern District of Illinois.*

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NOTE.—This brief has particular relation to the case of Post vs. Kendall County, but as it has many features in common with the case of Amoskeag National Bank vs. South Ottawa, we have thought proper to entitle it both cases.

## BRIEF AND ARGUMENT FOR THE PLAINTIFF.

This is a suit by the plaintiff against The County of Kendall, State of Illinois, upon thirteen bonds for $1,000 each, held by the plaintiff, part of an issue of $50,000 issued by said county, of date May 4th, 1869, and payable in three years from the 1st day of July, 1869.

The material facts are set forth in certain special findings of the court, set forth hereafter, so far as deemed material.

This case was before this court, together with that of Town of South Ottawa *vs.* Perkins, reported in 94 U. S. 260, and they were remanded with directions to award in each a new trial.

A new trial was had in the court below. The issues found for the defendant, and judgment in its favor:—"And it appearing to the court that upon the trial of this cause the circuit justice and the district judge were divided in opinion as to the questions of law and

fact upon which such division arose, it was ordered by the court that special findings and certificate of evidence herein be filed and entered at large upon the record, and made a part of the record herein."

The statutes of Illinois, so far as deemed applicable to the questions involved, are set forth in the prefatory portion of this brief.

## ERRORS ASSIGNED.

The errors assigned are:

1st. That the court erred in finding the issues for defendant, and in rendering judgment thereon for defendant.

2d. That the general finding for the defendant was inconsistent with the special findings, and that upon the special findings the judgment should have been for the plaintiff.

## THE POSITION OF THE CASE.

Assuming that the plaintiff's case depends for recovery therein upon the validity of the act of February 18th, 1857, entitled "An act authorizing certain cities, counties, incorporated towns and townships to subscribe to the capital stock of certain railroads," being the act recited on the face of the bonds, as the authority for their issue, it will be seen that the main question, under this assumption, is as to the validity of that act. The defendant sets up no other defense than the invalidity of that act as authority for the issue of the bonds.

Whilst the plaintiff in this case does not rest his case wholly on the act referred to, this brief and argument will treat firstly and mainly with that question.

THE PLAINTIFF'S CASE.

The facts upon which the plaintiff's case is based will be found in the first six special findings of the court, the facts thus found showing the issue of the bonds held by the plaintiff and in evidence in the case, to have been in all respects regular under the act recited upon their face, independent of all presumptions—all conditions of their issue having been fully complied with before their delivery and negotiation, and that the plaintiff is an innocent holder, for value, without notice of any supposed irregularity or want of power to issue the same.

(See 1st and 2d findings of the court.)

THE DEFENDANT'S POSITION.

The defendant denied that plaintiff could invoke any other authority than that recited upon the face of the bonds, or invoke any estoppels, and contended that the act recited in the bonds was no authority, for the reason that, under constitutional requirements, it had never become a law; claiming that the journals of the legislature failed to show that it had passed in one branch of the legislature (the Senate) by a yea and nay vote.

IS THE ACT OF THE 18TH OF FEBRUARY, 1857, TO BE HELD AS VALID OR INVALID?

The question is important, involving, as it does, near half a million of bonds issued under the provisions of the act.

When this case was formerly before this court, nothing was decided, as we regard it, further than that it

was error in the court below to refuse to admit the evidence of the certificate from the Secretary of State's office, purporting to set forth what the journals showed as to the passage of the act. Objection had been made to its introduction as evidence in the court below, and it had been ruled out, not upon the ground of any impeaching testimony, but upon the ground that it was not competent to impeach the act by such testimony.

This court held the certificate admissible as presented, but, as we understand the court left the question open as to its effect, and to be governed by the full evidence in the case under the law as it might be found to exist either by statute or otherwise. We do not think it can be insisted that this court intended to go further than this. The question of the effect of testimony impeaching the certificate was in no wise before the court, and hence was in no wise passed upon. As offered in evidence in the court below, the certificate, as held by the court, was at least *prima facie* good, and ought not to have been rejected on the grounds assumed in the court below.

So understanding the ruling of the court, when the case came up again for trial in the court below, the court received the certificate in evidence, but permitted impeaching evidence also to be heard, and thereupon made its findings.

We deem it wholly unnecessary to argue the admissability of the evidence tending to impeach the certificate of the Secretary of State.

It would appear upon its very face to be a monstrous absurdity to hold that an enrolled and published act of the legislature as a law could be impeached by a mere clerk's certificate, and it be held in the same connection that whilst the more solemn act might be so impeached,

yet the less solemn act of the clerk or secretary was unimpeachable. It is unnecessary to waste time in combatting such a proposition.

### THE ILLINOIS SUPREME COURT ON THE CONSTITUTIONAL REQUIREMENT AS TO THE PASSAGE OF LAWS.

The Supreme Court of Illinois, construing the somewhat peculiar provision in the constitution of that State requiring the passage of all laws to be by a yea and nay vote, which should be entered on the journals, held, in the case of *Spangler* v. *Jacoby*, 14 Ill., 298, and in a number of cases following, that if the journals failed to show the passage of an act by such vote, the act was invalid, as not having been constitutionally passed.

But the court also held that it could not take judicial notice of what the journals contained, and this must be proved as a matter of fact.

Upon this question, that the court will not take notice of the journals, the decisions of that court are uniform.

*Spangler* vs *Jacoby*, 14 Ill., 298.

*Railroad Co.* vs. *Wren*, 43 Ill., 79.

*People* vs. *De Wolf*, 92 Ill., 253.

*Grob* vs. *Cushman*, 45 Ill., 124.

The enrolled and published laws the court treats as valid, unless impeached by proof from the journals that the act did not pass as required by the constitution. In so far, therefore, as the cases before the court are dependent upon the act of Feb. 18, 1857, the important inquiry here is, whether that act was impeached by the evidence and findings of the court below.

With the evidence upon which these findings were based, this court has nothing to do, but must look for its light to the findings.

The errors assigned are to the effect that under the findings the judgment should have been for the plaintiffs in the cases: in other words, that the general finding for the defendant was inconsistent with the special findings, and from the special findings the general finding should have been for the plaintiffs.

The question whether these special findings were consistent with the general findings was the matter of disagreement (so far as we can judge from the record) in the court below, and caused the questions thereon arising to be certified to this court:

"*First—As to whether the act of Feb.* 18, 1857, *was or ever became a valid statute of Illinois; and,*

*Second—As to whether said plaintiffs upon said facts were entitled by law to recover in said actions?*

As before stated, when these cases were formerly before this court the single question then presented, was as to the admissibility of a certificate from the Secretary of State purporting to show from the *original* journals of the two Houses of the legislature, what the action of the legislature was upon the act in question. That certificate having been ruled inadmissable to impeach the act by the court below, this court held that ruling to be error. There was no question then before this court, and consequently no ruling as to what might be the effect of that certificate in connection with all the other evidence to be adduced in relation thereto, and as the case is now before the court with that evidence in, and the findings in connection therewith, the case is consequently here under wholly changed aspects for the determination of the court.

DO THE SPECIAL FINDINGS IMPEACH THE ACT OF THE 18TH OF FEBRUARY, 1857, AND WARRANT THE COURT IN HOLDING IT INVALID?

The findings of the court in respect of the act itself, are:

"5th. That ever since the year 1857 there has been on file in the office of Secretary of State of the State of Illinois an enrolled law bearing the title of the act referred to in said bonds, duly signed by the speakers of both houses of the General Assembly of the State of Illinois, for the year 1857, and approved by the Governor of said State on the 18th day of February, 1857."

"6th. That said enrolled law so deposited in the office of the said Secretary of State, was also published with and among the public laws of said State passed by the legislature of said State in the year 1857, in a volume published in pursuance of the laws of said State, labelled 'LAWS OF ILLINOIS,' at the end of which volume, in pursuance of a statute of that State, approved 14th February, 1831, was a printed certificate of said Secretary of State, stating that the laws therein contained are true and perfect copies of the enrolled laws on file in his office."

The records here before the court show that upon the faith of this act counties, cities and towns along the line of the proposed railroad voted subscriptions and issued and negotiated their bonds to pay such subscriptions; and in addition to this it is shown by legislative acts that the legislature had by two several amendments of the act recognized its validity and existence as a law. (See amendatory acts set out heretofore.)

In addition the Supreme Court of this State, in the cases of *Dunnovan* vs. *Green*, and *Force* vs. *Batavia*, had held and recognized the statute as binding and obliga-

tory, and had refused to enjoin the issuing of bonds by municipalities under it as late as the year 1871.

*Force* vs. *Batavia*, 61st Ill. 100.

*Dunnovan* vs. *Green*, 57th Ill. 67.

Here was legislative, executive and judicial recognition of the act for over fourteen years.

The bonds so issued were for years in the commercial markets, and in possession of innocent holders, for value, and so far as the bonds in suit are concerned, their validity never questioned until after their maturity.

It will be seen as we progress in this discussion that this question as to the rights of these bondholders after all these sanctions to their holdings had been given by the State of Illinois, by every department of its government, has been brought about by a simple certificate from the office of the Secretary of State, in that State purporting to be from the original journals of the legislature of 1857, to the effect that these journals fail to show that the act was passed in one of the houses by a yea and nay vote. And it was gravely argued in the court below that this certificate, which thus impeached these solemn acts of every department of the government, and to be followed with such disastrous results to innocent parties, was itself unimpeachable.

It is not to be wondered at that the judicial mind revolted (as it did in the court below on the first trial of these cases,) at even the offer thus to overthrow an act of the legislature, and destroy rights supposed to have been safely acquired under it. And we submit with all due deference, that whilst this court may hold such a certificate as admissable, *prima facie*, as purporting to contain the facts, it will yet well consider the weight to be attached thereto in view of all the findings of the court, and the general principles of law arising thereon.

Returning to the inquiry of whether the act of 1857 was or was not a valid law, and to the position of the Supreme Court of that State upon the requirements of the State Constitution on this subject, we find the first and leading case is that of *Spangler* vs. *Jacoby*, 14th Ill. 300.

In that case it was held that, although the presumption was that an act enrolled as a law and signed by the speakers of the respective houses and approved by the Governor, and published as a law, was a valid law, yet that under the requirements of the State Constitution to the effect that the passage of all acts should be by a majority of all the members elected, and that the yeas and nays on such passage should be entered on the journal, the presumption arising from the enrolled law might be rebutted by showing from the journals that the act was not thus passed.

The principle of this case has been adhered to with much uniformity by that court in subsequent cases, although a subsequently decided case of *Barr* vs. *Town of Auburn*, 89th Ill., 361, whilst appearing to recognize the authority of *Spangler* vs. *Jacoby*, goes very far towards overthrowing it.

It is also to be observed that in all the cases prior to *Lynch* vs. *Ryan*, 68 Ill., 160, and *Miller* vs. *Goodwin*, 70 Ill. 659, there was either no controversy as to the proof presented being from the journals, or, if not from the original journals, the court required it to be so shown.

In *Railroad Company* vs. *Wren*, 43 Ill., 79, the court say: "If counsel say the journal shows a law to have "been passed without calling the yeas and nays, let "them make the *requisite proof of that fact* by means of "the legislative journals, and introduce the *proof* into "the record." Again, in the same case: "We are not "aware of any law which makes the printed journal

"*evidence* of the contents of the original." Again, in *Grob* vs. *Cushman*, 45 Ill., 124, the court say: "On the "trial below no *evidence* from the journals was intro- "duced; but it is now argued that as they are public "records the court will take judicial notice of them, and "not require them to be embodied in the *evidence*. It is "true that they are public records, but it does not fol- "low that they will be regarded as within the knowl- "edge of the courts, like public laws. Like other "records and public documents they should be brought "before the courts as *evidence*."

And again, in *People* vs. *De Wolf*, 62 Ill., 253, the court say: "It appears by the return, which is not traversed, "and is to be taken as *true*," etc. * * * "Our de- "cision is predicated solely upon the *state of facts*, as set "forth in the return in this case, without an inspection "of the journals of the Senate, and we pass upon the "validity of the act in question no further than as "affects the present application in view of the *admitted* "*facts in the case*."

The case of *Ryan* vs. *Lynch* was before that court upon what purported to be, and from aught shown to the contrary in the case, was a certificate *from* the original journals; so that there was no departure in that case so far as the facts appearing before the court went, from the uniform circumstance that in all cases before *Miller* vs. *Goodwin* the facts as to what the journals contained were from the original journals themselves, or purported, without question, to be from the original journals.

In *Miller* vs. *Goodwin*, the source from which the facts certified were obtained, whether from the original journals or from a copy, was for the first time raised and put in question.

The case of *Spangler* vs. *Jacoby*, whilst explicitly holding to the position that an act of the Legislature might be impeached by a showing from the journals that it had not passed in the manner required by the constitution, had quite as firmly held as to the effect and weight of the presumption in favor of the enrolled law, that if the journal was lost or destroyed, that presumption would sustain the law. The language of the court is:

"The presumption, indeed, is that an act thus verified (by the signatures of the speakers and approved by the Governor) became a law pursuant to the constitution, but that presumption may be overthrown. *If the journal is lost or destroyed, this presumption will sustain the law, for it will be intended that the proper entry was made on the journal.* But when the journal is *in existence*, and it fails to show that the act passed in the mode prescribed by the constitution, the presumption is overthrown, and the act must fall."

*Spangler* vs. *Jacoby*, 14th Ill., 302.

In this connection we call the attention of the court to the seventh finding of the court below, as follows:

"*Seventh*—That at the session of the legislature of Illinois, which began fifth of January, 1857, and ended at 7 A. M. on the nineteenth February of same year, the Secretary of the Senate, with the aid of his assistants, in accordance with the general usage before and after that time, kept minutes of the proceedings of that body during each day as the business progressed, and after the close of the session for the day, made up from the minutes the journal of the proceedings for that day on paper prepared for that purpose, fastening the whole together at the top—which journal so kept and made up was the full and complete journal of the pro-

ceedings of the Senate for that day, and was the original journal of the Senate, which the plaintiff claims it was the duty of the Secretary of the Senate, under the law then in force, to deposit within ten days after the adjournment of the legislature in the office of the Secretary of State, and the journal which it was the duty of the Secretary of State to cause to be copied into a well-bound book by such person as the Secretary of State should contract with to do said copying, under the provisions of sections two, three and four of the act of the legislature of said State, entitled 'An act to provide for copying and distributing the laws and journals, and for other purposes,' approved 12th February, 1849; that in pursuance of said law the Secretary of State did provide the proper books and cause the said journal of the Senate to be copied therein, and said books still remain in the office of the Secretary of State of the State of Illinois."

The 11th, amongst others, finds "that after such copying and printing, no care was taken to preserve the original journals, and the same are now lost," "and that it never was the practice until after 1872, to preserve said original journals after they had been so copied into books," etc., etc.

Laying out of view, therefore, the position assumed by the Supreme Court of Illinois in the cases of *Ryan* vs. *Lynch*, and *Miller* vs. *Goodwin*, that the copy so copied from the original journal into the well-bound book, was, in fact, the original itself—we have here in the findings quoted the facts clearly found and declared by the court below—that the Senate, by its proper officer, kept not only "minutes of their proceedings" from day to day, but from day to day these minutes were written out into a full and complete journal, on paper prepared for that purpose, fastening the whole at the top, and

"*which journal so kept was the original journal of the Senate.*" With this finding before this court, it will be perceived at once that but for the supposed authority of the cases quoted (*Ryan* vs. *Lynch* and *Miller* vs. *Goodwin*,) the cases now before the court would stand wholly disembarrassed of any other consideration than the simple question of whether the original journals being lost, the presumptions in favor of the validity of the act, could be rebutted or were rebutted by the other special findings of the court.

To ascertain whether the cases before the court ought not to be disembarrassed of the authority claimed for the cases referred to, the attention of the court is solicited to a view thereof not hitherto presented, but which nevertheless we are persuaded is conclusive against them as authority for the cases now before the court.

THE CASES OF RYAN VS. LYNCH AND MILLER VS. GOODWIN ARE WITHOUT AUTHORITY. THE REASONS WHY.

Both these were cases in which respectively certain tax payers of municipalities voting bonds under the act in question were defendants, and the town or county officers charged with the collection of taxes to pay the bonds were defendants. The object and prayer of the bills were to have the bonds declared illegal and void and all taxes to pay the same enjoined. The bondholders, the only parties having any legal or substantial adversary interests in the suits, were not parties to the suits. Upon simple allegations in the bills that the bondholders were unknown or could not be ascertained, the court assumed jurisdiction to hear and determine the whole subject matter of controversy, and to render decrees declaring the bonds void and forever enjoining any tax for their payment. All this in the absence of the bondholders, or any of them, or of any representative of their interests.

It will be seen that the first and primary object of the bill was that the court should find, determine and decree that the bonds were illegal and void, and the injunction asked was to be consequent upon the finding that the bonds were so illegal and void.

Was this assumption of jurisdiction over the rights of parties in no way before the court warranted, and if unwarranted can the cases be authority for this court?

It is true that court quotes authority for the assumed jurisdiction, citing Story's Eq. Pl., sec. 117, but neither the text quoted, nor any of the authorities cited by the text writer at all justify the broad statement of the rule as to the dispensation of interested parties as made in the opinion.

No authoritative case can be found in which a court of equity ever proceeded to a final hearing and decree in a case in which the rights of an absent party, not represented, were necessarily affected by the decree. The general rule is, that all parties interested in the subject matter of the suit and of the decree to be rendered must be made parties.

It is true there are numerous exceptions and qualifications to this rule, but there is no exception extending to such cases as was before the court in the cases referred to.

These exceptions will be found to arrange themselves under a few general heads:

1st. When the defendants are too numerous to be practicably brought before the court having a common interest and standing upon the same footing, then the court will dispense with all being brought before it, and if enough are brought in to fairly contest for the rights of all, will allow the cause to proceed without the absent parties.

2d. Where the absent parties, either from their being without the jurisdiction or unknown, can be said to be represented by parties in *privity* with them who are before the court, as in the cases of a committee of a club or voluntary association, or the officers of a defunct corporation, or where the agents of an unknown party or parties without the jurisdiction are before the court—the absent parties will be held represented and the cause allowed to proceed.

3d. Where the court can adjudicate between the parties before it *without affecting or prejudicing the rights of the absent party*, there the court may proceed although the absent party may have been necessary and indispensable if a full and complete decree were sought in the premises between all parties in interest; but if the court cannot decree between the parties before it without affecting or prejudicing the rights of the absent party, there the court cannot proceed. In all such cases the absent party becomes an indispensable party.

For these well recognized rules see Story's Eq. Pl., Secs. 72, 75, 78, 79, 80, 81, 97, 136, 137, 138.

The rule as laid down in Adams' Equity, (side paging 320, is:

"It sometimes happens that compliance with the rule requiring the joinder of all interested parties is rendered practically impossible in a particular case, because the persons interested are too indefinite, or numerous to be individually joined in the suit. In this case, the rule admits of modification, so that one or more members of a class may sue or be sued on behalf of the whole, provided the interest of every absent member in the claim made or resisted is *identical* with that of the members who are personally before the court. * * * * The court, however, in such cases will not proceed to a decree until it is satisfied that the interest of

all is fairly represented, and that there would be a preponderating inconvenience in bringing them before the court."

Again says this same author, (side paging 322):

"In cases where persons interested are out of the jurisdiction of the court, it is sufficient to state that fact in the bill, and to pray that process may issue on their return, and if the statement be substantiated by proof at the hearing, their appearance in the suit will be dispensed with. The power of the court to proceed to a decree in their absence will depend on the nature of their interest, and the mode in which it will be affected by the decree. If they are only passive objects of the judgment of the court, or their rights are *incidental* to those of parties before the court, a complete determination may be obtained. But if they are to be active in the performance of the decree, *or if they have rights wholly distinct from those of the other parties*, the court, in their absence, cannot proceed to a determination against them."

Mr. Story, in his Equity Pleadings, says, after speaking of the general principles applicable to the exceptions to the general rule, that all parties interested should be before the court:

"Sec. 77. * * * * On the other hand, if complete justice between the parties before the court cannot be done without others being made parties whose rights or interests will be prejudiced by a decree, then the court will altogether stay its proceedings, even though those other parties cannot be brought before the court; for in such cases the court will not, *by its endeavors to do justice between the parties before it*, risk the doing of positive injustice to other parties not before it whose claims are or may be equally meritorious."

Again says this author:

"Sec. 81. It is an important qualification ingrafted on this particular exception (referring to where parties are out of the jurisdiction), which has already been incidentally alluded to, that persons who are out of the jurisdiction, and who are ordinarily proper and necessary parties, can be dispensed with *only when their interests will not be prejudiced by the decree, and when they are not indispensable to the just ascertainment of the merits of the case before the court.*"

The 47th and 48th rules of this court, and the act of Congress respecting the non-joinder of parties, contain but the essence of the general equity doctrines upon the same subject. In fact, on account of the more limited character of the jurisdiction of the United States Courts, in respect of parties, these rules have been framed rather to enlarge the English equity rules with respect to the dispensation of parties who cannot be brought before the court; yet, under these rules, this court has uniformly held that where the real merits of a cause cannot be determined without essentially affecting the interest of absent persons, it will not proceed in the cause; nor will it decree between the parties before them if the decree directly affects the rights of such absent persons. And the court bases its rulings in these cases not only under the chancery rules of the court, but also upon all recognized general equity doctrine.

*Russell* vs. *Clark's Ex's*, 7th Crauch., 69.

*Cameron* vs. *McRoberts*, 3d Wheat., 591.

*Mallow* vs. *Hinde*, 12th Wheat., 195.

In the case last cited the court say, in speaking of the absence of an indispensable party who was not before the court:

"We do not put this case upon the ground of jurisdiction, but upon a much broader ground which must apply to all courts of equity, whatever may be their structure as to jurisdiction; we put it on the ground that no court can adjudicate directly upon a person's rights without the party being either actually or constructively before the court."

This case is further instructive as showing the extent to which a court might take jurisdiction until the indispensable parties were before the court, it says:

"We have no doubt the circuit court had jurisdiction between the complainants and the defendant Hinde, so far as to entertain the bill and grant an injunction against the judgments at law until the matter could be heard in equity."

And the court proceeds to indicate in what manner the bill, after injunction thus granted, could stand over until the court could properly adjudicate upon the merits with proper parties before it.

See also the cases of *Shields* vs. *Barrow*, 17 How. 137. *Bank* vs. *Carrollton R. R.*, 11 Wall, 624.

The authority cited by the Supreme Court of Illinois for entertaining jurisdiction in the cases referred to, is sec. 117 of Story's Eq. Pl. Mr. Story, after stating in several preceding sections the exceptions to the general rule, that all parties in interest should be joined so far as plaintiffs were concerned, proceeds, in sec. 116, to state the exceptions, also as to defendants as follows:

"Sec. 116. Thus far we have been considering cases where the bill is brought by some proprietors as plaintiffs on behalf of all. But the like doctrine applies to cases where there are many persons defendants belonging to a voluntary association, against whom the suit is brought. In such cases it is sufficient that such a num-

ber of the proprietors are brought before the court as may fairly represent the interests of all, where those interests are of a common character and responsibility. Thus, for example, where a committee of a voluntary club or association entered into agreements and incurred expenses on account of the club, it was held on a bill brought by a creditor against the committee, that it was not necessary to make the *other members of the club* parties to the suit on account of the members being numerous as well *as unknown*. In such a case it seems proper, if, indeed, it be not indispensable to charge in the bill that the members are numerous and many unknown."

Sec. 117. Upon similar grounds, where a joint stock company, created under an act of parliament were sued for a specific performance of an agreement for a lease entered into by the vendors of certain real estate which was sold by them *pendente lite*, and the treasurer and directors only were made parties, the court overruled the objection that *all* the proprietors were not made parties. On that occasion the court after examining the leading authorities, added the following expressive language: "There is a current of authority, more or less a general principle of exception, by which the rule that *all persons* interested must be parties, yields when justice requires it in the instance of either of plaintiffs or defendants. The rigid enforcement of the rule would lead to perpetual abatement. This, therefore, cannot be regarded as a new point, or as creating a difficulty. It is quite clear that the present suit has sufficient parties, *and that the defendants may be considered as representing the company*."

The foregoing is the authority quoted by the Supreme Court of Illinois in the case of *Ryan* vs. *Lynch*, for hold-

ing in that case that it was unnecessay for any party adversely affected in interest to be before the court even by representation.

The court made no pretence whatever, as indeed there could have been none, that the parties in interest were represented by the county officers.

Applying these recognized principles to the cases of *Ryan* vs. *Lynch* and *Miller* vs. *Goodwin*, it will be at once apparent that the bondholders were indispensable parties to any adjudication in those cases, and that the court, in proceeding to a final decree adjudicating their bonds to be void and perpetually enjoining the officers from collecting any taxes for their payment, assumed unwarranted jurisdiction over the rights of parties who were in no wise before the court.

The court could not proceed to a decree against the tax officers, the only parties before it, adjudging the tax illegal by reason of the invalidity of the bonds, without directly affecting thereby the rights of the absent bondholders, as the taxes they were enjoined from collecting were payable to the bondholders, and constituted their only means of receiving payment.

It is idle to say that such a decree did not directly affect the rights of the bondholders; and it is equally idle to attempt to argue that these county officers, charged with a mere duty by law to collect the taxes, in any wise represented the bondholders as parties defendant to the suit, or that the interests of these county officers stood upon the same common footing and were *identical* with those of the bondholders.

Now whilst this court holds itself bound by the law and rule, it has frequently laid down—that it will follow the decisions of the State courts where the construction of their own Constitution and laws is involved—

we nevertheless, upon general principles, take it to be equally clear that this refers to following only that class of decisions which have been rendered in cases wherein the proceedings have, in a proper sense, been *adversary* in their character, with adversary parties before the court, and wherein from the position of the case with respect to parties before the court, it was warranted in proceeding to final judgment. Where the contention was between the substantial parties in interest to the controversy—where the parties to the controversy were interested in alleging, proving and arguing the full merits of their respective sides of the controversy; and that this court, as other courts, would hold as utterly without authority, a decision in any case rendered, wherein it was apparent the court had assumed jurisdiction unwarrantably in the absence of the real parties to the controversy, and where those parties had had no opportunity of a hearing in the cause.

We submit that such cases do not come within the rule referred to.

This court has heretofore, in a well considered case, declared the rule by which it will be governed in applying this rule in reference to following the decisions of the State courts. The case of *Carrol* vs. *Carrol*, 16th How. 287, was a case arising under the laws of Maryland, and a decision of the Supreme Court of that State upon a construction of their laws as applied to the very matter in controversy, was pressed upon this court as controlling authority. This court, in answer, say:

"If the court of appeals had found it necessary to construe a statute of that State, in order to decide upon the rights of parties subject to its judicial control, such a decision, deliberately made, might have been taken by this court as a basis on which to rest our judgment. But it must be remembered that we are bound to decide

a question of local law, upon which the rights of parties depend, as well as every other question, as we find it ought to be decided. In making the examination preparatory to this finding, this court has followed two rules—one of which belongs to the common law, and the other is a part of our peculiar judicial system. The first is the maxim of the common law, *stare decisis*. The second grows out of the thirty-fourth section of the judiciary act, (1 Stats. at Large, 92,) which makes the laws of the several States the rules of decisions in trials at the common law; and inasmuch as the States have committed to their respective judiciaries the power to construe and fix the meaning of the statutes passed by their legislatures, this court has taken such constructions as part of the law of the State, and has administered the law as thus construed. But this rule has grown up, and been held with constant reference to the other rule, *stare decisis;* and it is only so far and in such cases as this latter rule can operate, that the other has any effect,

"If the construction put by the court of a State upon one of its statutes was not a matter in judgment, if it might have been decided either way without affecting any right brought into question, then, according to the principles of the common law, an opinion on such a question is not a decision. To make it so, there must have been an application of the judicial mind to the precise question necessary to be determined, to fix the rights of the parties, and decide to whom the property in contestation belongs.

"And, therefore, this court, and other courts organized under the common law, has never held itself bound by any part of an opinion, in any case, which was not needful to the ascertainment of the right or title in question between the parties."

"In *Cohens* v. *The State of Virginia*, 6 Wheat. 399, this court was much pressed with some portion of its opinion in the case of *Marbury* v. *Madison*, and Mr. Chief Justice Marshall said: "It is a maxim not to be disregarded, that general expressions in every opinion are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented. The reason of this maxim is obvious. The question actually before the court is investigated with care, and considered in its full extent; other principles which may seem to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." The cases of *Ex parte* Christy, 3 How. 262, and *Peck* v. *Jenness et al.* 7 Ibid. 612, are an illustration of the rule, that any opinion given here or elsewhere cannot be relied on as a binding authority, unless the case called for its expression. Its weight of reason must depend on what it contains.

"With these views we cannot regard the opinion of the court of appeals as an authority on which we have a right to rest our judgment. We have already stated the reasons which have brought us to a different construction of the statute; reasons which do not seem to us to be shaken by the opinion of the court of appeals.

"Our conclusion is, that the will of Michael B. Carroll was not within the statute, and the lands in question were consequently undevised."

The assumption of jurisdiction in the cases was based upon the necessities of the complainant's case. But the necessities of no person to be heard in respect of his own alleged rights as against another, can be greater than the necessities of that other person to be heard in

his own defense, and hence the necessities being equal, a court should not proceed until both can be heard.

It will be seen from the character of the bills of complainant in the cases referred to, that the alleged necessity of a failure of justice otherwise did not exist. The defendants to the bills were the officers of the county, charged with the collection of the taxes for the payment of the bonds, and it was alleged that the bonds were illegal and void, and the excuse laid in the bills for not making the bondholders parties, was that they were unknown and could not be ascertained. Now admitting that the officers charged with the collection of the taxes were necessary and proper parties, although they had no substantial interest in the suit, and admitting that the bondholders, the only substantial parties in interest, were not then known, nor could be ascertained, what was the rightful extent to which the court could have gone?

Clearly it was to have granted an injunction against the collection of any taxes to pay the bonds, until a hearing with proper parties could be had, and upon granting such an injunction to order the bill to stand over, with leave to bring in the proper parties when they could be ascertained, or some of them as representatives of all. It will be clearly seen that this course would have protected every right of the taxpayers, and would necessarily have compelled the bondholders to appear and make themselves parties.

Every step taken beyond, was *non jurisdictional* clearly *coram non judice*, and without apology or excuse. Had the court stopped with an injunction, until these necessary parties were before it, there would have been no occasion for prejudging the merits of the case, without a hearing from the only parties interested in an adversary sense. In the absence of necessary parties it

is considered that the showing before the court is necessarily partial only and imperfect, and, if it be said that the defendants before the court had the right to raise the controversy by objecting to the injunction, and the controversy having been raised, it was incumbent upon and necessary that the court should determine it, we concede that the court had the right to determine it, but provisionally only as upon an interlocutory proceeding in the absence of indespensable parties; but that no judgment thus rightfully only interlocutory, could be authoritative.

That we are correct in saying that there were absolutely no parties defendant in an adversary sense to the suits referred to, we have the direct authority of this court. This court in the case of *Harter* v. *Kernochan*, U. S. R. 103, p. 566, referring to a similar suit under the removal acts, says in relation to this question: "We do not doubt that the suit was one which the defendant was entitled under the act of March 3, 1875, chap. 137, to remove from the State court.

"Disregarding as we may do, the particular position whether as complainants or defendants, assigned to the parties by the draughtsman of the bill, it is apparent that the sole matter in dispute is the liability of the township upon the bonds; that upon one side of that dispute are all of the State, county and township officers and taxpayers who are made parties, while upon the other is Kernochan, the owner of the bonds, whose validity is questioned by this suit. He alone of all the parties is, in a legal sense, interested in the enforcement of liability upon the township. It is therefore a suit in which there is a single controversy embracing the whole suit between citizens of different States, etc., etc."

Why the courts of Illinois got into the habit of assuming jurisdiction in this class of cases (municipal bonds)

without the presence of the real parties to the controversy before the courts, can only be accounted for upon the ground that the courts had unconsciously became responsive to the local influences by which they were surrounded, for it will be found that in all other classes of litigation standing upon the same principles as to parties these courts recognized, the true rules as held by all other courts.

*Atkins* v. *Billings*, 72 Ill. 597.

*Pratt* v. *Pratt*, 96 Ill. 146.

*Hellman* v. *Schneider*, 75 Ill. 422.

*Rees* v. *Petzer*, id. 475.

*Howell* v. *City of Peoria*, 90 Ill. 104.

The last case cited recognized the true rule upon the subject.

The bill was filed by taxpayers against the city authorities to restrain an alleged unconstitutional tax—the tax being levied to pay certain creditors for building water works for the city—the creditors for whose benefit the tax was levied were not made parties, and the court below dismissed the bill. The Supreme Court on appeal by the city, held the order of dismissal of the bill below erroneous.

The court say (p. 108.)

It is said that Dean Brothers (the creditors to whom tax would be due) were necessary parties to the bill, and that the bill was properly dismissed, because they were not made parties The bill should not have been dismissed for this reason, but retained in order that the proper parties might be made, citing *Knapp* v. *Marshall*, 26 Ill. 63, and *Thomas* v. *Adams*, 30 id. 37.

In the prefatory part of the opinion the court held that the injunction asked for was proper, at least to the

extent of restraining the levy or assessment of any tax for the payment of this indebtedness. Manifestly, however, the court meant by this, taken in connection with what is afterwards said, as above quoted, that this injunction should have been interlocutory until the parties in interest were before the court.

Granting that a preliminary injunction was proper whilst only the tax officers were as yet parties, this being interlocutory only in its character, and granted only upon a showing of facts in the absence of the parties in interest, no decision or opinion rendered at that stage of the cause, whether upon review by appeal or otherwise, could be authoritative even with the court in which the the case was pending, until the indispensable parties in interest were before the court and could be heard.

That the cases of *Ryan* vs. *Lynch* and *Miller* vs. *Goodwin*, were never at that jurisdictional stage (for want of parties) that the court was warranted in rendering a final decree, and delivering an authoritative opinion on the merits of the controversy, is clear; for, as before stated, the cases were never at that jurisdictional stage in respect to parties before the court, that warranted any further action by the court than such as was merely interlocutory in its character; and when the cases went by appeal to the Supreme Court, the cases were still in that inchoate stage by reason of defect of parties, as to warrant no further action or discussion, or opinion thereon than such as was proper to a case in that condition, a case in which indispensible parties, whose rights alone were to be sacrificed, were not before it, and hence either action or opinion in the case could only have properly been pronounced until necessary parties were in the case, and so being provisional only,

could not be authoritative. Everything beyond this was mere *obiter dictum*, and entitled to so much the less weight, as there was neither excuse or apology for indulging it.

*The facts here have not been in judgment in the cases referred to.*

Passing from the consideration however, that the questions involved in the cases now before the court were never in judgment in the cases of *Ryan* v. *Lynch*, and *Miller* v. *Goodwin*, for the reason that indispensable adversary parties were not before the court. We would say further that the cases now before the court were not in judgment in the case referred to, because it is evident that the court in these cases had not the facts before it, as these facts are presented by the findings in this case.

The facts thus recited were to the effect that the Senate itself by its officers kept only minutes on blanks prepared for taking the yeas and nays. There appears to have been no evidence that these inchoate minutes were by the same Senate officers written out in full into a complete journal, *on paper prepared for that purpose.* No evidence there, as the findings here show, " that the journal thus written out was the full and complete journal of the Senate. The evidence there was of inchoate minutes only. The evidence here is of a complete journal made by the officers of the Senate.

We say, therefore, that it is manifest that the facts of this case were never in judgment in the cases referred to.

Having, as we believe, shown that the cases of *Ryan* vs. *Lynch* and *Miller* cannot, for reasons given, be regarded as authoritative with this court, we shall deal with them no further than to point out some

glaring absurdities therein (if they are to be quoted for their reasoning). We may say, however, in reference to the weight to be accorded the reasoning of these cases, that, in the very nature of things, the reasoning of a court upon a subject in litigation in which but one side of the controversy has been heard must be imperfect, for the reason that the court has not had the opportunity of gathering the material or evidence for correct reasoning thereon.

In *Ryan* v. *Lynch* the case went off upon the mere production of the certificate of the Secretary of State, purporting to be from the Senate Journals, and had the necessary parties been before the court, and the effect of that certificate not rebutted, they could not have complained of the decision as it was in accord with the former rulings of the court. The great error of that case was in holding that the bondholders were not necessary parties—there was nobody before the court interested in impeaching the certificate.

In *Miller* v. *Goodwin*, however, the officers who were the defendants *ex mero motu*, seem to have raised a controversy over the certificate. What interest these officers could have had to have raised even a question about it we cannot imagine, They could have had no interest sufficient to justify them in bringing the proper evidence before the court to impeach that certificate, or surely the court would not have found from the evidence that the officers of the Senate merely kept minutes of the proceedings of that body, and that their imperfect 'minutes' were afterwards written out as a complete journal by the contractors into the "well bound book." There certainly could have been no evidence before the court in that case showing that after the 'minutes' thus taken during the day on blanks prepared for that purpose, these 'minutes' during the evening

were written out into a complete journal of the days proceedings, by these same officers of the Senate, *on paper prepared for that purpose*, and that thus a full and complete journal was made, and from which as an original, whatever went into the "well bound book," could have been only a copy.

With the full evidence before the court it could never have gotten itself into the predicament of being compelled to hold on a question of variance, between what the journal showed as written up by the Secretary of the Senate and his assistants, and what the copy made by the contractors *for copying* in the well bound book, might show the court would take the "well bound book" as the true and only completed and original journal, and reject the evidence as shown by the journal as made by the officers of the Senate.

In other words, hold the copy to be the original and primary evidence.

### A CONSIDERATION OF THE STATUTES BEARING UPON THE QUESTION AT ISSUE.

The very full and clear exposition of all the statutes of Illinois bearing in any way upon the question here at issue, as presented in the brief of Mr. Perry in the case of the *Amoskeag National Bank* vs. *Town of Ottawa*, on hearing with the case of *Post* vs. *Kendall County*, renders further particular discussion of these statutes unnecessary here.

The great stumbling point with the court in *Ryan* vs. *Lynch* and *Miller* vs. *Goodwin*, was over certain merely *directory provisions* of those statutes as to the manner of *keeping*, *i. e.* preserving the journals.

It was not pretended that there was any constitutional or statutory enactment defining or attempting to

define what a journal was, or what it was to be otherwise than as expressed in the Constitution: "*Each house shall keep a journal of its proceedings, which shall be published.*"

The Constitution itself does not further define its character, nevertheless its character is fully and explicitly fixed by the language used. What constituted the journal of a parliamentary body was well understood and needed no defining. The injunction to the Senate was, that it shall *keep a journal*, not merely 'minutes,' from which a journal might be manufactured by somebody else, not under its own cognizance and supervision. And we say here that it was not in the power of the legislature to absolve either of its houses from this Constitutioual duty—from causing to be made a full and complete journal of its proceedings in a parliamentary and elementary sense, and under its own cognizance and supervision. Nothing short of this could be a journal of its proceedings in any parliamentary or Constitutional sense. The legislature might make directory provisions as to the manner merely of its keeping, when, what kind of paper, or whether in binding, etc., and as to the manner of its preservation, but it could not make any dispensation of the duty imposed upon each house of making for itself a complete journal of its proceedings.

But the court in the cases referred to confounds itself over certain directory provisions of the statutes about *leather* and *binding*, and overlooking the fundamental consideration that nothing in the very nature of things could be the journal of a parliamentary body, and in the sense expressed by the Constitution of the State, but a document prepared of its proceedings, under its own authority and supervision. allowed itself to be guided in its research for this journal by the merely sup-

posed directory provisions of the statutes as to the manner of its preservation.

The statute of 1836 (see act quoted in preface,) had *directed* that the journals shall be kept in well bound books; therefore, reasoned the court, nothing could be a journal not so kept or bound in a "well bound book." It mattered not that the Senate had made its journal complete under its own supervision. If that journal could not be found in a well bound book, it was not to be held as the journal of the Senate; but a *copy* of incomplete "minutes," although made by persons in no way amenable to the Senate, if found in a well bound book was to be taken as the only true, original and complete journal of that body.

It is to be observed that the court in *Miller* vs. *Goodwin*, nowhere claim that there was any statutory enactment defining or attempting to define what the journal was, or of what it was to be, otherwise than as expressed in the Constitution; nor is it pretended that these statutes were passed for the purpose of declaring what shall be evidence of the "journals."

We admit the right of the legislature to declare what shall be evidence, but it is not claimed by the court that these statutes were passed for the purpose of prescribing evidence of what the "journals" were. Indeed it could not have been so claimed, as these statutes plainly and only are directory in their character, and prescribe no rule of evidence. Whenever a statute intends to prescribe a rule of evidence, it plainly says so.

Statutes referring to the journals are referred to in the opinion of the court, not so much for construction as for the purpose of evidence, as indicating the fact as to what was the journal. The court either not having before it the proper and full evidence of how the Senate

Journal was kept, made up, and deposited, or disregarding this evidence were groping in the statutes to find statutory calls and descriptions that would aid as evidence in ascertaining what document was the original Senate Journal, and thus groping, by the most artificial reasoning, the court came to the finding that the *copy* was in fact the original. All the construction of statutes involved was a construction to harmonize a misunderstood state of facts, and make an absurd finding in some way, consist with the statutes.

Whatever may be held as to the obligation of this court to follow the State tribunals in the construction of the statutes, we assume that at least their jurisdiction to hear evidence and try cases according to the facts before them will not be questioned, and that this jurisdiction as to the evidence cannot be impaired by confounding statutory constructions and evidence together in a State tribunal, and holding this court bound by its determination upon the combined result, when the court can see that the facts as fully presented here were not really in judgment in that court.

*What were the statutes in force and controlling the evidence as to what constituted the journals when the act of* 1857 *was passed, and subsequently down to the present time?*

The constitution provided "that each house should keep a journal of its proceedings, which should be published."

We have before seen that it was not competent for the legislature to dispense with this mandate, and in justice to the legislature it should be said that it never attempted or intended to dispense with it.

By the second section of an act approved January 16, 1836, (see act set forth, p. 11) it was enacted:

"SEC. 2. The journal of each house of the General Assembly shall hereafter be kept in well bound books. The Secretary of the Senate and the clerk of the House of Representatives shall furnish to the public printer every morning during each session of the General Assembly *a copy of the journal* kept by them respectively, of the day preceding the last day's journal; and the said secretary and clerk shall within ten days after the adjournment of each session of the General Assembly deposit the *original journal* kept by them as aforesaid with the Secretary of State."

The statute of 1845 charged the Secretary of State with the safe-keeping, in his office, of all public laws, acts, *and records* deposited therein. (See act of 1845)—preface.

These acts were in force in 1857, and so have contiued in force, by revision or re-enactment, ever since.

Under the two first recited statutes it will be seen that the original journals were to be deposited by the Secretary of the Senate and Clerk of the House within ten days after the adjournment of the session; and the Secretary of ~~the~~ ~~Senate~~ State was to preserve and safely keep the same. Such were the positive injunctions of the statutes referred to.

These statutes were of binding force and authority on the officers of the House and Senate, and on the Secretary of State.

*Act of* 1849:

The act of 1849 had, however, provided that the journals should be copied into well bound books by contractors for doing the general copying required of legislative work, and the practical construction of this act seems to have been, and probably it was proper, that this dispensed with the necessity of the journals being kept

in well bound-books by the Clerk of the House and Secretary of the Senate; but surely it cannot be pretended that the act of 1849 in regard to the copying of the original journal in any way modified, repealed or dispensed with the injunction of the act of 1836, that the original journal (whether bound or not) was to be deposited with the Secretary of State, and being so deposited that the Secretary of State was to safely keep and preserve the same.

Why were these original journals to be so returned, and why were they to be safely kept and preserved? For the purpose and only purpose of affording the primary and highest evidence of the proceedings of those bodies should those proceedings ever after come in question. No statute of the State can be referred to that in any way gives countenance to the idea that the legislature ever intended to dispense with compliance with these regulations of the law, on the part of those officers.

Such being the law it will be seen that notwithstanding for some purpose, not very clear, (and which the legislature by its action since in repealing the act) have declared purposeless, required the journals to be copied by contractors under the law of 1849, the law was still in force requiring the preservation and safe-keeping of the original journals by the Secretary of State in his office, and for good reason. They were to be so safely kept and preserved that any inaccuracies or omissions of any copy thereof might be corrected—at all times to speak for themselves as to their contents.

There has been much surmizing as to what the purpose of the act of 1849 could have been in providing for these journals to be copied. We have seen that the legislature, by its act of April 20, 1873, requiring the

original to be bound, and the act of March 30, 1874, repealing the act of 1849, have declared there was no purpose in it. But as rational a purpose as any other that can be conceived would be, that it was somewhat inconvenient (not impracticable, as said in *Miller* vs. *Goodwin*,) to write out the proceedings in a bound book as the proceedings progressed. Whatever the supposed inconvenience was, it was done before, as the bindings show, and as the act of 1873 requires, is now done. Admitting some inconvenience, however, to attend the practice, that may have been partly the reason for dispensing with the writing up the proceedings in a bound book. We can see that the legislature supposed, as under the laws in reference to the safe keeping of the journals, these journals would be kept safely deposited, although unbound, and to be appealed to, whenever needed in evidence, yet for the ordinary purposes of ready reference a bound copy would be convenient, and so this ready hand-book to the original journals was provided.

However this may be it is certain that the act of 1849 no where intimates a purpose of repealing or modifying in any respect the provisions of the act of 1836 in reference to the deposit of the original journal with the Secretary of State, nor of his duty under the act of 1845 to safely keep and preserve the same.

Now can a disregard of these acts by these officers, and a negligent abuse which sprung up of treating the dopositing and safe preservation of these original journals as a matter of no consequence alter or in any wise affect the *status* of this original journal, in law, as affording the primary and highest evidence of its own contents?

We have seen that the statutes of 1845 in regard to the safe keeping of the journals by the Secretary of

State and of 1836 requiring the Clerk of the House and Secretary of the Senate to deposit the originals of their journals within ten days in the office of the Secretary of State, were in full force. And as special findings have been made of these abuses—called usages, we suppose the argument to be based thereon, is that these superseded the law—such abuses and negligences being in no wise recognized by the legislature.

Counsel for defendants insisted upon findings in the court below as to these usages by the Secretary of State and others in the treatment of the original journals, and upon findings as to how the Secretary treated and held the well bound book, (copy of the journals made by the contractors) and the high estimation placed by the Secretary on this book, and the fact that these books since the act of 1849 had been labeled just as the original journals were before that time and all kept in a row labeled "Senate Journals."

These findings we submit are all inconsequential.

A usage of the Secretary's office cannot make or change the requirements of positive enactments. The Secretary's usage or opinion about the character of the 'bound book' cannot alter its *status* under the laws of evidence; nor can the indifference of the officer about the preservation of the originals, as required by law, alter or affect their standing under all rules of evidence, as being the true, original journals of that body.

If those original journals had been safely kept and preserved by the Secretary of State, and if *from them* a certificate had been given by the Secretary of State under the act of March 9, 1869, showing the proceedings of the Senate only to have been, as shown by the copy in the "well bound book," then, hard as it might be, the rights of our clients, so far as they were

based upon the act of 1857, might have to be surrendered; but we say never, upon showing merely of what a doubtful copy may show.

As shown conclusively in the brief of Mr. Perry, whose argument we are not justified in repeating here, there is not now, nor was there ever, a statute making a certificate of the contents of this copy of the journals, copied in the well bound books, evidence for any purpose. The statute providing for the making of this well bound copy never contemplated making it evidence for any purpose, for the all sufficient reason that the law had provided that the original should be safely preserved in the Secretary's office, and as the original was supposed to be safely on deposit, there could have been no reason for allowing a certificate to be given from a copy.

*Again we ask what was the Senate journal of* 1857?

Undoubtedly it was, that document prepared by its secretary and his assistants, whilst that body was in session or was so in session, in contemplation of law, fully written up and completed by these officers and read to and approved by the Senate, or in contemplation of law so read and approved by that body. This constitutes a full and complete journal. It is perfect; it is not an inchoate document, these are not merely 'minutes.' Nor does its *status* or character depend upon whether it is bound or unbound. Upon elementary, parliamentary, and general principles its character and *status* as the primary and highest evidence of the proceedings of the body is fixed. It is self-evident that a document merely purporting to be a copy of this original, manipulated into a bound book by the copying clerks of the contractors, acting under the authority of another department of the State, after the Senate had adjourned, and in the absence of that body, never

by any sound reasoning, could be exalted to the place of the original document, nor supercede that original as the highest evidence of its own contents.

To sum up the situation as it exists under the statutes of this State.

1. The law of 1819, in force in 1857 and ever since, required the Secretary of State to safely keep all laws and records which should be deposited in his office.

2. The law of 1836 required the officers of the two Houses to deposit their journals (whether in binding or otherwise) in the office of Secretary of State, and these being records the Secretary was bound to safely keep and preserve them as required by the act of 1845.

3. The law of 1849 in regard to copying the journals into well bound books, whilst properly interpreted, may have dispensed with the keeping of the journals by the officers of the Houses in bound books, did not dispense with their keeping a complete journal of the proceedings of their respective Houses, nor dispense with the duty on their part to deposit the same in the Secretary of State's office, there to be safely kept as provided by law.

4. In contemplation of the statutes and law those original journals of the session of 1857 should have been on file and safely within the keeping of the Secretary of State, when he gave his certificate in evidence in this case, and that certificate should have been from those journals thus preserved and not from the supposed copy made by contractors.

5. No statute ever made the contents of the copy from which that certificate was given evidence for any purpose whatever. The legislature contemplating that the originals were in safe keeping to be used or certified from when needed, never designed to make this copy evidence.

6. As the whole point of the case of *Miller* vs. *Goodwin* was based upon the argument that the copy in the 'well bound book' was in fact the original completed journal, and as we think this position has been demonstrated untenable, we close this branch of the discussion, with the assumption that it is very clear, THAT THE ORIGINAL JOURNAL OF THE SENATE OF 1857 IS LOST OR DESTROYED—as the special findings of the court below have declared.

THE ORININAL JOURNAL BEING LOST OR DESTROYED, TO WHAT EXTENT AND BY WHAT CHARACTER OF EVIDENCE WILL THE COURT PERMIT THE ACT OF 1857 TO BE IMPEACHED? CAN IT BE IMPEACHED BY SECONDARY EVIDENCE OF THE CONTENTS OF THE LOST JOURNALS?

An enrolled act of the legislature signed by the speakers of the two houses of the legislature, approved by the governors and published to the world under the sanction of the authorities of a State as a law of that State is in many of the States, the ultimate evidence as to what the law is.

(See numerous authorities quoted under this head in brief of Mr. Petty.)

Upon acts thus published to the world by the authorities of Illinois, an immense amount of capital from the citizens of other States and of foreigners have been invited into and invested in the State.

The questions of whether these acts are to be held as good whilst the money is coming in under them, and invalid when a return of the money is asked, directly and vitally affects all commercial transactions based upon these laws, and particularly affects that class of rights within the protection of this court.

Granting that this court will follow the ruling of the Illinois courts that an act thus given to the world may

be impeached by showing from the journals that the law did not pass in the manner required by the Constitution of the State, will the court go farther than the Supreme Court of Illinois has ever done in any case properly in judgment before it, and permit the law to be impeached by any class of secondary evidence?

If the original and primary evidence to impeach the law is lost or destroyed, upon the highest principles of public policy and right, ought any less certain evidence than that of the highest (the primary) be allowed a higher force and presumption as evidence than that afforded by the enrolled and published act? And particularly where there has been a long acquiescence in, and important rights, in good faith, have been, or supposedly acquired under the law?

To the credit of the Supreme Court of Illinois it should be said, that in no case has it intimated that this impeachment could be made by evidence less high than the primary evidence afforded by the journals themselves. Even in the cases of *Ryan* vs. *Lynch* and *Miller* vs. *Goodwin*, the admission of the certificate of the Secretary of State was put upon the ground that the Secretary was in fact certifying from the original journals.

But in the leading case of *Spangler* vs. *Jacoby*, (supra) it was said by the court: "That if the journal was lost or destroyed the law would be sustained by the presumption in its favor, for it will be intended that the proper entry was made upon the journal."

CHARACTER OF THE SECONDARY EVIDENCE RELIED ON AS TO THE CONTENTS OF THE LOST JOURNAL.

*First—As to the well bound book from which the certificate of the Secretary of State was given, and the printed journals.*

As we have heretofore seen, no statute either made that book evidence, or authorized a copy to be given from it as evidence by the Secretary of State.

We have seen that by the law of 1849, respecting contracts for copying the laws, journals, etc., it was the duty of the Secretary to provide books in which the journals were to be copied.

The seventh finding of the court, amongst other findings is: That the Secretary did provide the books, and caused the said journal to be copied therein, and said books still remain in said office, etc. But the court further finds that the persons who so copied said journals of the Senate and of the House of Representatives for the year 1857, into said books, were not charged by law with the duty of copying said journals in said books, and the court further finds that said copies were not compared with the original by the Secretary of State, nor do they appear to have been compared by any sworn officers of the State except as herein stated. The court further finds in this connection that John S. Roberts, who was in the winter of 1857, the principal enroliing and engrossing clerk of the Senate, in conjunction with Mr. Higbee, an employee of the Senate *either copied himself, or superintended in a general way* the copying of the journals for 1857. One Collard had the contract for such copying and was under bonds to do the same. He failed to perform the contract. Boberts and Higbee applied to the Secretary of State for permission to do the work; that officer replied that he didn't care who did the work, that he held Collard's sureties responsible, and that if the sureties did not object he would not. The sureties assented to Roberts and Higbee having charge of the copying; the journals of the Senate were handed to Messrs. Roberts and Higbee by request of the Secretary of State to be copied into the "well bound book."

8th Finding—That books *so purporting* to be a copy of the journal of the Senate for the year 1857, and made in pursuance of said act of 12th of February, 1849, show, etc. Here follows proceedings of the Senate as shown by said book, and same as certified by the Secretary of State therefrom. The findings of the court thereon being that, "said copy (*i. e. purported* copy) shows no other action of the Senate in regard to said bill (act of 18th of February, 1857,) than its reading a first and second time, and its reference to the committee on banks and corporations.

11th Finding— * * * And the court further finds that at the time of the adjournment *sine die* of said General Assembly, on the morning of the 19th of February, 1857, the proceedings of the Senate of the 18th, 17th, 18th, and 19th days of February, 1857, had not been written out by the Secretary of the Senate, or by any one else, but were for the first time written out after the adjournment of the Senate, and within ten days thereafter by the proper officers of the Senate, and they were transcribed in said well "bound book," before being sent or taken to the public printer.

12th Finding—That after the close of the session of the legislature for the year 1857, the journals of the House of Representatives and of the Senate were published by the Secretary of State, which journals, as thus published, show the same proceedings in reference to said act in question as appears in the well 'bound book,' and as are set forth in the certificate of the Secretary of State, and none other. The printing of the journals of that session was done under the official supervision of the Secretary of State, and he caused the printed journals to be compared with the original cap paper journals, with a view of having them correct. It was

his habit to compare the *printed* journals with the originals *when he could conveniently do so*, and when he could not, it was the *duty* of his assistants to do it. But the Secretary of State could not remember whether the portion of the printed journals relating to the statute in question was compared with the original journal by himself or his assistants, and it does not appear who compared that particular portion of the journal.

The foregoing are the findings of the court with respect to the "well bound" book and the printed copy of the journal offered in evidence. In connection therewith, however, the attention of the court is called to the ninth, tenth and eleventh findings:

9th. "That it also appears from a similar well bound book, in like manner purporting to be a copy of the journal of the House of Representatives for the year 1857, that on the 17th day of February, 1857, a message was received by the House from the Senate, through the assistant secretary of the Senate, returning said bill to the House, and informing the House that the Senate had concurred with the House in the passage of said bill; that on the same day the committee of the House on enrolled and engrossed bills reported said bill to the House as correctly enrolled; that said bill was afterwards duly signed by the speaker of the House and president of the Senate, and duly laid before the Governor for his approval; and on the 18th day of February, 1857, a message was received by the House from the Governor informing the House that the Governor had approved and signed said act, and the said act was thereupon duly deposited with and filed by the Secretary of State in his office as a valid statute of the State of Illinois, and so remains there on file.

10th. That it also appears from the evidence in this case that the Senate, on the 16th day of February, 1857,

passed many bills, in the following manner, to-wit: Several bills, to the passage of which there was no objection from any member of the Senate, were read and placed together in a bundle or package and but one call of the ayes and noes was had on the final vote on their passage; but it was the practice of the Secretary of the Senate, in making up the journal, to have the journal show that the ayes and noes were called on each bill separately; that it was the practice of the Secretary and his assistants to make up a sheet showing the title of each bill, and the ayes and noes on its passage, with appropriate entries on that sheet or on others attached thereto, showing in detail the action of the Senate in the passage of such bills, which sheets should have been fastened together in their proper order, and thereby make up the journal of the Senate, so far as it related to the passage of such bills.

11th. That a part of said original journals, so kept and made up from day to day by the Secretary of the Senate, for said session of 1857, were delivered by the Secretary of the Senate, for said session of 1857, directly to the public printer, to be printed before being delivered to the Secretary of State, and the greater part thereof were delivered by the said Secretary of the Senate, upon the request of the Secretary of State, directly to Mr. Roberts or to Mr. Higbee, and by the Secretary of State, either before or after they had been copied into the "well bound book" as stated, they were delivered to the public printer, that when said original journals were taken to the office of the public printer, they were there separated and the sheets distributed to compositors, for the purpose of being printed, and when printed returned to the office of the Secretary of State; and if they had not previously been copied by the copyist into the "well bound book" were then copied by him into said book, and after such copying and printing no care

was taken to preserve such original journals, and the same are now lost; and that it never was the practice, until after 1872, to preserve the original journals of the legislature after they had been so as aforesaid copied into books to be kept in the office of the Secretary of State and so printed in the published journals.

The 11th finding shows distinctly that the officers of the Senate, whilst the matter was fully before them, acted on the assurance of the due passage of the bill. The Assistant Secretary of the Senate reports the bill with a message that the bill received the concurrence of the Senate, and the bill on the succeeding day is signed by the speakers of both houses.

But the 10th finding discloses fully how the passage of bills was manipulated in the Senate. They were passed in what was then popularly known as the "omnibus" way. A number of bills to which there were no objections put in a bundle—one call of the ayes and noes on the whole bundle. The Secretary, in making up his journal, however, would make it show a several call of the ayes and noes on each bill. The manner of his making up his journal is very suggestive of the clue to *what now* appears from the copies of this journal. It was his practice to make up *a sheet* showing the title of each bill and the ayes and noes thereon, with appropriate *entries on that or some attached sheet* showing in detail the passage of the bill, which *sheet* or *sheets should have been fastened together* in their proper order, and thereby make up the journal.

The 11th finding is yet more suggestive of what the real facts were.

11th. It appears from this finding that it was the practice of the Secretary of the Senate, with at least a portion of the journal of that session, to deliver the same directly to the public printer, to be printed before

being delivered to the Secretary of State, and portions, a greater part thereof, delivered to Mr. Roberts (contractor for copying); and, after being copied, were then delivered to the public printer. The public printer, when said original journals were delivered to him, separated the sheets and distributed them to compositors for the purpose of being printed, and when printed, were returned to the office of Secretary of State. *And if they had not previously been copied* by the copyist into the "well bound book," *were then copied into the "well bound book!"*

These findings, taken together, are pregnant with presumptions as to how both the printed copy and the copy in the "well bound book" fail to show the passage of the bill in the Senate.

The missing proceedings were, in all probability, written out on "a separate sheet or sheets attached thereto," made into a package "*which should have been*" fastened at the top. In this condition it was delivered to the public printer, taken apart, distributed to numerous compositors, and the necessary hazards of carelessness or accidents in a printing office growing out of such a practice; or, if the package was carelessly made up in haste by the Secretary of the Senate and delivered first to Roberts (the copyist), this sheet showing these proceedings have been misplaced or lost, either before or after it came to his hands; for it appears that although the package "should have been fastened at the top," there is no finding that it was always done so. Indeed, as the evidence in this case discloses, all these parties, in utter disregard of the positive requirements of the statutes, used no care whatever in their dealing with the original journals.

As it was much easier to copy from a printed than a manuscript journal, we can see how the copyists would encourage the practice of printing it first.

In answer to the very strong presumption arising as to the loss of such a sheet, it will be said that any such presumption is rebutted by the 11th finding,—that it is there found that at the time of the adjournment of the legislature, the last three days of the Senate proceedings had not been written out by the Secretary of the Senate; that he afterwards, and within ten days, wrote them out and they were transcribed in the 'well bound book,' before being delivered to the public printer.

From the character of the facts thus found, however, it will be at once perceived that the finding must have been upon the parol testimony of a witness, testifying long years after the event, and subject to all the infirmity of that species of testimony. If a witness proposes to have so extraordinary a recollection of the fact transpiring so long in the past, as there were no means of contradiction the court of course would accept his testimony, and make its findings thereon.

But even this finding if accepted, considering that it must have been made upon the recollection of a witness so long after the event, to rebut the presumption of the sheet being lost in the hands of the printer, does not rebut the presumption of the loss of the paper either before or after the proceedings may have been handed to the copyist.

It will be urged that the correspondence between the copy in the well bound book and the printed journal, is corroborative of the theory, that the original journals did not contain the missing proceedings as both purport to have been made from the original journal. This argument is deceptive. If the journal was in part copied before it went to the printer, and had suffered dimunition from any cause *before* or *while* in the hands of the copyist, of course such dimunition would follow it when it went to the printer,—if printed first and then

sent to the copyist, any dimunition suffered either before or after it went to the printing office would follow it to the copyist.

So much for the argument of corroboration. This discussion of these findings must be highly suggestive of the wisdom of the position taken by the Supreme Court of the State of Illinois in the case of *Spangler* vs. *Jacoby*. "If the original journals be lost, the presumptions in favor of the act will sustain it."

It will be claimed, however, that the Supreme Court did not mean to exclude secondary evidence. What the court did mean we think was, that no secondary evidence, such evidence being necessarily only presumptive in its character ought to outweigh the higher presumption afforded by the enrolled law of its having properly passed.

The "well bound book" we have seen was never made evidence by the statute for any purpose; nor is there any statute authorizing a certificate to be given from it as to its contents.

### THE PRINTED COPY.

The Supreme Court of Illinois in *Railroad Co.* vs. *Wren*, 43d Ill., 79, say: "If counsel say the journal shows a law to have been passed without calling the yeas and nays, let them make the *requisite proof of that fact* by means of the legislative journals," &c.

And again says the court in the same case:

"We are not aware of any law which makes the *printed journal* evidence of the contents of the original."

By the act of 1874 the journals thereafter published after providing for careful comparison, were for the first time made evidence.

TO WHAT CLASS OF EVIDENCE THE "WELL-BOUND BOOK" AND PRINTED COPIES OF THE ORIGINAL JOURNAL BELONG.

Although all classes of secondary testimony stand upon the same grade, yet they do not necessarily afford the same degree or weight of presumption. They are more or less satisfactory according to their respective characters.

A carefully prepared copy of a lost original would stand highest in order. But from the findings in this case, that there can be no pretence that these copies are proved as compared copies. The findings are to the effect that the copy, both in the bound book and the printed copy may have been compared by somebody, but that they certainly were does not appear. We repeat, that proof that comparison was made by somebody is not the proof of a sworn or compared copy.

EXAMINED COPY—HOW PROVED.

"The proof by an examined copy is by *producing a witness* who has compared the copy word for word with the original, or who has examined the copy while another person read the original; the latter mode of examination will suffice without proof that the witness examined the original both ways, and without calling both persons engaged in the examination, for it will not be presumed that a person wilfully misread the record."

Phillips Ev. vol. 2, p. 354.

In secondary evidence there are no degrees, that is, no precedence or superiority in point of admissibility, an attested copy of a written instrument is not a superior order of proof to an examined copy, *nor is either superior to parol evidence of the contents.*

Phillips, vol. 2, p. 568.

"An examined or sworn copy is in general to be proved such by one who has compared it with the original."

*Kerns* vs. *Swope*, 2 Watts. 75.

Certified copies are evidence only by local law. These must depend for their competency upon the question whether by the local law the officer is authorized to give out certified copies.

*Garland's Ex's.* vs. *Goodler's Admrs.* 2 Hayward, 351.

*Garwood* vs. *Dennis*, 4 Binney, 314.

*Baker* vs. *Preston*, 1 Gilmer, 235.

And if the record itself would not be evidence, neithor would sworn or certified copies of it merely as such.

*Wain* vs. *Patterson*, 9 Pet. 676.

*But if these copies are not sworn or compared copies, what are they?*

Clearly they belong to that lower class of testimony to which is afforded a presumption, that having been made in the regular course of official or other duty, the presumption arises that they were correctly made. They become admissable evidence, but admissable evidence affording a low grade of presumption. Like entries made by shop-keepers in the usual course of their business; like the presumptions arising from the acts of officers, as having been rightly performed; like the presumptions arising from the mailing of a letter, that it reached its destination in due course of mail. This is the class of evidence to which these copies belong, and whilst they are admissable evidence, the presumptions they afford may always be met by any species of evidence which in its nature ought to afford a stronger presumption.

The authorities, cited from Greenleaf, go no further than to make the printed journals either admissable under statutes or under this common law rule, as affording *prima facie* evidence of the original. We have seen that our court in *R. R. Co.* vs. *Wren*, 43d Ill. 77, decided in 1867, denied that up to that time there was any statute by which they were made evidence in this State.

*Comparison of Presumptions.*

Defendants counsel insists that *Spangler* vs. *Jacoby* ought not be interpreted as excluding secondary evidence of the contents of the journal where the original is lost or destroyed. The court in deciding that case surely was not ignorant of the general rule of evidence, that when an original writing or document is lost or destroyed, secondary evidence of its contents is in general admissable, and undoubtedly did not overlook it. What the court said however was, "that if the journal be lost or destroyed the *presumption* afforded by the enrolled act would support the law, as it would be intended that the proper entry was made upon the journals." The court here, in referring to the effect of the *presumption* afforded by the enrolled law, had in mind the strength that would be afforded to that presumption over any class of mere secondary evidence. Secondary evidence of the contents, whether by written or printed copy, or in the absence of these, verbal recollection or memory, are admissable under general rules of evidence, where an original writing is lost or destroyed, as affording a *presumption* of what the contents of the original were. But in every case of this character of testimony such presumption may be rebutted. In the nature of things this class of evidence cannot go further than as affording a presumption of what the contents of the original were; and the court in *Spangler* vs. *Jacoby* had evidently in mind the relative *strength*

*of presumption* that the enrolled act should be entitled to, as against the presumption any mere secondary grade of evidence should afford. The secondary evidence being heard, and the enrolled law being produced, it becomes at once a question of presumption against presumption. Ought the presumption arising from the enrolled act to prevail, or the presumption arising from the secondary evidence, as to the contents of the journal? Laying out of the consideration entirely all questions of public policy, let us see whether in the very nature of the case the presumption arising from the enrolled act ought not to prevail. The bill for the act goes through its various stages in each House—the sworn officers and clerks of each House are noting each step of its progress until it goes through all the stages to perfect it as a law. It is reported first from one House to the other as having passed the House from which it is reported—when concurred in by passage in the last House to which it is reported, that fact by the proper officer is reported to the House in which the bill originated. It is the duty not only of the clerks of each House to note and know whether a bill has properly passed or not, but it is the duty of the speakers of each House before they sign an act as having passed, to know that it has been regularly passed. The Governor signs the act as a law regularly passed, knowing it is to be published to the world as a law, and that his signature thereto is to receive faith as to its due passage. Knowing this, however, the Governor in signing does so no doubt upon the very high presumption alone afforded by the signatures of the speakers of the two Houses. This presumption is with him so high and so strong that no doubt he acts unhesitatingly without investigation in placing his signature to the act. Now can it be claimed that a presumption thus weighty in the very nature of the case, ought not to be held as

strong, in case of the loss or destruction of the journals, as the presumption arising from secondary evidence merely of the contents of the journal?

That the Supreme Court of Illinois hitherto in no single case has ever allowed a law to be impeached by any evidence which they held of a secondary character, we think it is a clear recognition of the true rule as to the weight of presumptions, in the absence of the original. And in this connection we desire to call the attention of the court to the very recent case in that court of *Lowenthal et al.* vs. *People*, 93 Ill., 191, to show the improbable and forced presumptions that court will make to support an act under which citizens of the State had invested their capital, and wherein this very question, as to what the journals showed as to the passage of an act, was involved. In that case the Court repeat approvingly the former doctrine of the court as to the high presumption accorded to the enrolled law.

To accept of any evidence short of the primary would make the existence of a law depend upon the variable testimony that parties might from time to time be able to adduce in cases arising under it. At one time the evidence might exist to support the law; at another time the lack of this evidence might impeach it.

TO SUM UP THE FINDINGS.

The findings are:

That the act of 18th February, 1857, was duly signed by the speakers of the two houses, approved by the Governor, and published with the other laws of the State as a duly enacted law.

2d. That the original journals of that session of the legislature are lost or destroyed.

3d. That the bonds in suit were issued upon the faith of that act upon a vote of the people of Kendall county, and every requirement of the act, and every condition upon which they were voted, were complied with.

Such being the findings, we hold all other findings in the case as inconsequential, and as in no wise affecting the plaintiff's right to recover.

The other findings made by the court do not make the "well bound book" the original journal, because the court had already held that original to be lost.

The findings of the court as to the usages or customs in the Secretary of State's office are wholly immaterial as such usages or misusages could not make law, and the more so as they were in direct disregard of positive duties enjoined by the statutes of the State.

There is no finding that either the "well bound book" or the printed journal, either as a whole or as to that portion relating to the proceedings as to the passage of the act in controversy, was ever compared with the original. The finding to the effect that either Roberts or *somebody else* compared the "well bound" book with the original is not proof of an examined; and the same holds true of the printed copy, to the effect that the secretary, *or some* of his assistants, compared it.

These findings are all immaterial; for if they proved all that it is claimed for them, they could not rebut the presumption in favor of the act in the absence of the original journal.

The general finding being thus inconsistent with what was material in the special findings, we hold the judgment should have been for the plaintiff. It may not be improper to indulge the surmise that the general finding must have been in deference to the supposed

authority in the case of *Miller* vs. *Goodwin*. But the view of that case, now for the first time presented, we believe will relieve this court from all pressure arising from that case as authority.

THE BONDS ARE GOOD INDEPENDENT OF THE ACT RECITED AS THE AUTHORITY FOR THEIR ISSUE.

We invite attention to the act of March 27, 1869, amendatory of the Railroad Charter. The effect of this act was passed upon by the court in *Town* vs. *Perkins*, 94 U. S., page 269, and the court there held that we could not avail ourselves of its provisions, because it did not appear from the record in that case that the Town of South Ottawa or Kendall County were embraced in its provisions. It did not appear by the record in that case that either South Ottawa or Kendall County "*were near to*" said road, or that the same was located through the territory of said corporations, and for this reason *only*, as we understand the decision, the act mentioned could not be quoted as authority for the issue. By the record in the case at bar, we bring ourselves directly within the terms of the act. The court finds, "That the railroad, in aid of which said " bonds were issued, was constructed through Kendall " county prior to the final delivery of said bonds, and " now runs through said county, and from thence hith- " erto has been and is now in active operation," etc.

Two objections are interposed to the act in question. First. That it was not passed till after the election was called; and secondly, the act was not relied on or recited as authority for the issue of the bonds.

It is true the act was not in force at the time the election was called by the authorities of Kendall county, but it is also true that at the time of holding

the election (March 30th, 1869,) and at the time of issuing the bonds the act was in full force. The most that can be said is, that under this act we had no power to call the election, and to that extent *only* the election was "*irregular*." The proposition that mere "*irregularities*" in calling and holding elections, will not avail the county against the innocent holder of bonds, is too familiar to need the citation of authority. We do not seek to give this act *retroactive force*, as was intimated in *Town* vs. *Perkins*, (supra); we insist the corporation is bound, notwithstanding the fact there was no authority for calling the election, and the calling thereof at the time, amounted to nothing more than a mere *irregularity*, and consequently has nothing to do with the question of *power*.

But can we claim power under this act and other acts to which we shall hereafter call attention, or are we precluded from so doing simply because this and other acts authorizing the issue of the bonds are not recited on the face thereof, *as* the authority relied on by the county. It must be ~~considered~~ conceded that the act recited as authority for the issue was treated by both county and railroad company as a law in force, and perhaps as the sole authority, and it must also be conceded (if defendants had successfully impeached the act recited) that both parties were mistaken. Under these circumstances can we invoke powers not recited or relied on by either party. Upon what principle of law or justice should we be precluded from availing ourselves thereof. Suppose the bonds contained no direct reference to any particular act of the legislature, or suppose that portion of the bonds which recite the supposed void act of 1857, was stricken out they would then read that they were issued "*as required by law*," and would it then be contended that we could not rely upon the amendatory act

or any other act authorizing their issue. We know of no rule or decision of this or any other court which requires the authority to be recited on the face of the bond. On the contrary we insist that a bond containing no recital whatever of authority, would be good provided the innocent holder could show the authority independent of the bond. The law is that a corporation will not be allowed to take advantage, of a *false* recital of power as is sought to be done in this case. "If a muni-"cipal corporation, in dealing with individuals, assumes "that it possesses certain corporate powers, upon which "the validity of its acts depends, and it turns out that it "does not possess the specific powers relied on, it is not "thereby excused from the performance of its obliga-"tions, if they *can be performed through the agency of* "*other powers that it does possess.*"

*Maher* vs. *City of Chicago*, 38 Ill, 273.

If the authority quoted is sound the bonds are not only valid under the act of March, 1869, but also under the act of March 6th, 1867, in relation to LaSalle and other counties, cities and towns, &c., and the bonds of Kendall county are also good under the general railroad law of 1849, the first section of which is hereinbe fore quoted. In aid of the bonds issued by the town of Ottawa, we call special attention to the act of 1867 above mentioned. The attention of the court below was not called to this act, nor did we know of its existence until very recently. By an examination of the act it will be seen that long prior to the holding of the election (the Ottawa town election which was December 3d, 1867) the law was in force, and it will also be observed that the terms of this act in relation to the preliminary proceedings required to be taken are substantially the same in every particular as those required by the *alleged void* act. As to the Kendall county

bonds the law of 1849 above referred to contains power for their issue, and all counsel for plaintiff can say against this power is that it was not relied on, and that the election was not called thereunder, nor was there such a majority of votes in favor of the issue as is required thereby. For answer to the latter objection we observe that by the terms of the registry law of 1869 herein quoted, the county authorities in order to secure the registry of the bonds were required among other things to swear, and they did swear that a majority of all "*the legal voters living in said county*" had voted for the subscription. We submit that the fact so sworn to is equivalent to stating that a majority such as is required by the general law voted for the subscription—and having so sworn the corporation is not allowed to contradict its record.

Counsel seem to forget that *mere informalities in holding the election* are not deemed sufficient grounds in this court to justify the robbery here attempted, as this court has never considered the act of calling an election an "*essential proceeding.*" Such "*irregularities*" cannot be considered. *East Lincoln* vs. *Davenport*, 94 U. S. 801. In *Commissioners* vs. *January*, 94 U, S. 205, it appears the election was called January 25, 1869, under an act then in force. The election was held April 6th, following. Between the calling and holding of the election, the act under which it was called, was *repealed* "by the act of February 27, 1869," and so far as appears from the facts there was no *saving clause* in the repealing statute. The last act mentioned, however, gave the power, and the election, though not called thereunder, was, in fact, substantially in compliance with its terms. Under these facts it was urged that the election was without authority and conferred no power to issue the

bonds. The court in answer to this position say: "Whatever may be the fact, we are satisfied that after the passage of the act of 1869, all the proceedings were in substantial conformity to its requirements. *It was in force before the election was held and until after the bonds were issued and delivered.* So in this case the acts under consideration were in force when the election was held, and when the bonds were issued, they are still in force, and their validity has never been questioned. It will also be observed that the bonds in that case recited that they were issued under the act of February 25, 1868, under which act the election proceedings were instituted, and no reference whatever was made to the real authority contained in the act of February 27, 1869. In that case a *repealed* statute was recited as the authority. In the case at bar a *void* statute (according to the theory of counsel) was recited. In that case the court looked beyond the recital of the bond for power. In this case we do not ask more.

Again: "A purchaser is not always bound to look "further than to discover that the power has been con- "ferred, *even though it be coupled with conditions prece-* "*dent.*" *Pendleton County* vs. *Amy*, 13 Wall. 305; and in the same case it is said, in speaking of the county: "When, therefore, they make a subscription and "issue county bonds in payment, it may fairly be pre- "sumed, in favor of an innocent purchaser of the bonds, "that the condition which the law attached to the "exercise of the power has been fulfilled."

To the same effect are:

*Knox County* vs. *Aspinwall*, 21 How. 539.
*Bissell* vs. *Jeffersonville*, 24 How. 287.
*Moran* vs. *Miami County*, 2 Black. 722.
*Myers* vs. *Muscatine*, 1 Wall. 384.
*Van Hostrup* vs. *Madison*, 1 Wall. 291.

*Supervisors* vs. *Schenk*, 5 Wall. 772,
*Lexington* vs. *Butler*, 14 Wall. 283.
*Grand Chute* vs. *Winger*, 15 Wall. 355.
*Coloma* vs. *Eaves*, 92 U. S., 284.
*Town of Venice* vs. *Murdock*, 92 U. S,, 594.
*Marcy* vs. *Oswego*, 92 U. S., 638.
*Town of East Lincoln* vs. *Davenport*, 94 U. S., 801.

In the last case cited the Court says: "In a suit by a "*bona fide* holder against a a municipal corporation, to "recover the amount of coupons annexed to bonds "issued by it, under authority conferred by law, ques- "tions of form, merely, or irregularities, or fraud, or "misconduct, on the part of its agents, cannot be considered."

The same general doctrine is announced in

*East Oakland* vs. *Skinner*, 94 U. S,, 258.
*County* vs. *Nicholay*. 95 U. S., 619.
*Town* vs. *Strong*, 96 U. S., 271.
*County* vs. *Ray*, 96 U. S., 675.
*County* vs. *Cromwell*, 96 U. S:, 51.

This court say: "A *bona fide* purchaser of negotiable "paper for value, before maturity, takes it freed from "all infirmities in its origin, unless it is absolutely void "for want of power in the maker to issue it."

*This court is not bound by the adjudications of the State court in cases where negotiable securities are involved, and we have the right to demand the unbiased judgment of your honors.*

In *Supervisors* vs. *Schenck*, 5 Wall., 784, the court say:

"Attention is drawn to the fact that in a recent case not yet reported, the Supreme Court of the State (Illinois) have held that these bonds are void, even in the hands of an innocent holder, but inasmuch as the

power to issue the bonds was fully conferred by law, the question of their validity in the hands of an innocent holder, without notice, is a question of commercial law, where the State adjudications, although entitled to great respect, do not furnish the rule of decision in this court."

In the case of *Swift* vs. *Tyson*, 16 Peters, p. 1, Justice Story, in construing the 34th section of the judiciary act, says:

"It is, however, contended that the 34th section of the judiciary act of 1789, c. 20, furnishes a rule obligatory upon this court to follow the decisions of the State tribunals in all cases to which they apply. That section provides 'that the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States, in cases where they apply.' In order to maintain the argument it is essential, therefore, to hold that the word 'laws,' in this section, includes within the scope of its meaning the decisions of the local tribunals. In the ordinary use of language, it will hardly be contended that the decisions of courts constitute law. They are, at most, only evidence of what the laws are, and are not of themselves laws. They are often re-examined, reversed and qualified by the courts themselves, whenever they are found to be either defective, or ill-founded, or otherwise incorrect. The laws of a State are more usually understood to mean the rules and enactments promulgated by the legislative authority thereof, or long-establisned local customs having the force of laws. In all the various cases which have hitherto come before us for decision, this court have uniformly supposed that the true interpretation of the 34th section limited its application to State laws

strictly local; that is to say, to the positive statutes of the State, and the construction thereof adopted by the local tribunals, and to rights and titles to real estate, and other matters immovable and intraterritorial in their nature and character. It never has been supposed by us that the section did apply, or was designed to apply, to questions of a more general nature, not at all dependent upon local statutes or local usages of a fixed and permanent operation, as, for example, to the construction of ordinary contracts or other written instruments, and especially to questions of general commercial law, where the State tribunals are called upon to perform the like functions as ourselves; that is, to ascertain upon general reasoning and legal analogies, what is the true exposition of the contract or instrument, or what is the just rule furnished by the principles of eommercial law to govern the case.

"And we have not now the slightest difficulty in holding that this section, upon its true intendment and construction, is strictly limited to local statutes and local usages of the character before stated, and does not extend to contracts and other instruments of a commercial nature, the true interpretation and effect whereof are to be sought, not in the decisions of the local tribunals, but in the general principles and doctrines of commercial jurisprudence. Undoubtedly the decisions of the local tribunals upon such subjects are entitled to, and will receive, the most deliberate attention and respect of this court; but they cannot furnish positive rules, or conclusive authority, by which our own judgments are to be bound up and governed. The law respecting negotiable instruments may be truly declared, in the language of Cicero, adopted by Lord Mansfield in *Luke* vs. *Lyde*, 2 Burr R., 882, 887, to be, in a great measure, not the law of a single country only, but of the commercial world."

To the same effect are

*Gilpike* vs. *Dubuque*, 1 Wall., 206.
*Pine Grove* vs. *Talcott*, 19 Wall., 666.
*Roberts* vs. *Bolles*, 101 U. S., 129.
*County of Warren* vs. *Marcy*, 97 U. S,, 103.

Nor is this court bound by the adjudications of the State courts where their rulings have not been uniform. Nor is this court required to change its rulings to conform to the State courts.

In *Pease* vs. *Peek*, 18 Howard, 599, the court say: "When the decisions of the State court are not consistent, we do not feel bound to follow the last, if it is contrary to our own convictions, and much more is this the case when, after a long course of consistent decisions, some new light suddenly springs up, or an excited public opinion has elicited new doctrines subversive of former safe precedent. Cases may exist also where a case is gotten up in a State court for the very purpose of *anticipating* our decision of a question known to be pending in this court. Nor do we feel bound in any case in which the point is first raised in the courts of the United States and has been decided in a circuit court to reverse that decision contrary to our own convictions in order to conform to a State decision made in the meantime. Such decisions have not the character of established precedent declarative of the settled law of a State. Parties who, by the constitution and laws of the United States have a right to have their controversies decided in their tribunals, have a right to *demand the unbiased* judgment of the court. The theory upon which jurisdiction is conferred on the courts of the United States, in controversies between citizens of different States, has its foundation in the supposition that possibly the State tribunal might not be *impartial* between their own citizens and foreigners."

For a scathing review of the inconsistent decisions of the Supreme Court of Illinois on questions involving the validity of municipal bonds, the court is referred to *Livingston County* vs. *Darlington*, 11 Otto. 410. A careful examination of the decisions of the Illinois Supreme Court we think will disclose the fact that during the *railroad building period* of the State when it was necessary to give currency and value to bonds, the decisions were uniformly in support thereof. It was during that period the cases of *Prettyman* vs. *Tazwell Co.*, 19 Ill. 406, and *Johnson* vs. *County of Stark*, 24 Ill. 90, and many other cases of like import were decided, all of which are in harmony with the rulings of this court, and the general principles governing negotiable paper. But after the roads were constructed chiefly by the money of foreigners paid in exchange for the bonds, the *bond paying period* was inaugurated, and thereupon the Supreme Court of Illinois took a *new departure* and a "*new light suddenly springs up*," and then began a long line of decisions in aid of repudiation, the spirit of which was abroad in the land. To that period the cases of *Ryan* vs. *Lynch; Miller* vs. *Goodwin; Williams* vs. *Roberts*, 88 Ill. 21; *Goddis* vs. *County*, 92 Ill. 119, and last but not least, *Post* vs. *Wlech*, 99 Ill. 471, belong. The latter case contains the *startling intimation* the court will hold that by the constitution of 1848 it is necessary the *subject of bonds* shall be mentioned in the TITLE of the act under which authority for the issue is claimed. Such a decision is all that is necessary to wipe out every bond in the State. In view of the foregoing it it is not only our right but our duty to "*demand the unbiased judgment*" of this court upon the questions involved in the cases at bar.

*The corporations having legislative power, "irregularities" and "mistakes" in its exercise, cannot avail, and they are estopped from questioning the validity of the bonds.*

*Prettyman* vs. *County*, 19 Ill. 406.
*Johnson* vs. *County*, 24 Ill. 90.

"When, therefore, they make a subscription and issue "county bonds in payment, it may fairly be presumed, "in favor of an innocent purchaser of the bonds, that "the condition which the law attached to the exercise "of the power has been fulfilled."

*County* vs. *Amy*, 13 Wall. 305.

To the same effect are:

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*Myers* vs. *Muscatine*, 1 Wall. 384.
*Van Hostrup* vs. *Madison*, 1 Wall. 291.
*Supervisor* vs. *Schenk*, 5 Wall. 772.
*Lexington* vs. *Butler*, 14 Wall. 283.
*Grand Chute* vs. *Winger*, 15 Wall. 355.
*Coloma* vs. *Eaves*, 92 U. S., 284.
*Town of Venice* vs. *Murdock*, 92 U. S., 594.
*Marcy* vs. *Osweyo*, 92 U. S, 638,
*Town of East Lincoln* vs. *Davenport*, 94 U. S., 801.

In the last case cited the court say: "In a suit by a "*bona fide* holder against a municipal corporation, to "recover the amount of coupons annexed to bonds "issued by it, under authority conferred by law, ques- "tions of form, merely, or irregularities, or fraud, or "misconduct, on the part of its agents, cannot be con- "sidered."

*East Oakland* vs. *Skinner*, 94 U. S., 258.
*County* vs. *Nicholy*, 95 U. S., 119.
*Town* vs. *Strong*, 96 U. S., 271.
*County* vs. *Ray*, 96 U. S., 675.
*County* vs. *Cromwell*, 96 U. S., 51.
*San Antonia* vs. *Mahoffy*, 96 U. S., 313.

"The taking and holding the certificate of stock, issuing and delivering the bonds, and paying the interest for a time, cured the defect as to the order for an election, if any such existed."

*Commissioners* vs. *January*, 94 U. S., 202.

To the same effect is *County* vs. *Vansgell*, 96 U. S., 688.

The court, in *Talcott* vs. *Pine Grove*, *supra*, say:

"It would be in the highest degree inequitable and unjust to permit the defendant to repudiate a contract, the fruits of which he retains."

And in *Coloma* vs. *Eavs*, the court, in discussing the immorality of the defense, say:

"Saying nothing at present of the dishonesty of such a defense, while the consideration for which the bonds were given is retained, we come at once to the question, etc."

In *San Antonia* vs. *Mahoffay*, *supra*, it is said "the doctrine of *ultra vires*, whether invoked for or against a corporation, is not favored in the law. It should never be applied where it will defeat the ends of justice, if such a result can be avoided." We only ask the application of this doctrine to the case at bar. We have already shown the gross injustice which will follow a decision adverse to the holders of the bonds involved in this case. We have also shown, as we think, undoubted power in the county to issue the bonds, and this, we think, is all that a court of justice should require at our hands.

Respectfully submitted,

MILTON HAY, AND
D. T. LITTLER,
*Attorneys for Plaintiffs.*

OFFICE SUPREME COURT U.S.
FILED
APR 17 1882
JAMES H. McKENNEY, CLERK

IN THE

# SUPREME COURT OF UNITED STATES.

POST

NO..... *v.*

KENDALL COUNTY.

AND

AMOSKEAG BANK

NO..... *v.*

TOWN OF OTTAWA.

REPLY TO ARGUMENT OF JUDGE DICKEY,

BY

MILTON HAY AND D. T. LITTLER.

SPRINGFIELD, ILL.:
H. W. ROKKER, PRINTER AND BINDER.
1882.

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## REPLY TO ARGUMENT OF JUDGE DICKEY,

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The brief of Judge Dickey having been filed herein, since our reply to the brief of Mr. Phillips, we shall be excused for a few additional suggestions in reply thereto, on one branch of this controversy, distinctly connecting what is here said with our argument in chief and the reply to Mr. Phillips.

This brief of Judge Dickey is more notable for its silence on the more material points of the controversy on the act of 18th of Feb., 1857, than for anything it expresses.

In our opening argument we discussed fully and at length the question of the *authority* claimed for the cases of *Ryan* v. *Lynch*, and *Miller* v. *Goodwin*, taking the position that the cases were essentially *ex parte* in their character and wanting in those conditions requisite to make any judgment or opinion rendered therein authoritative in another court—based upon the objection that indispensable parties to the controversy whose rights were essentially affected thereby, were not before the court. Our position was that such cases were wanting in every element to render applicable the principle of *stare decisis*, and we invited the attention of the court to this point, as one not hitherto presented to this court, as affecting the authority claimed for those cases.

The reply to this point made by Mr. Phillips we have sufficiently noticed. But upon this point it is to be noted that Judge Dickey is silent. If he has any answer to make, it is not in his brief. He prefers to ignore the question.

Nevertheless, Judge Dickey, in formidable headlines, (p. 24), formulates the principle "THAT EVERY STATE MUST HAVE POWER TO DECIDE UPON THE AUTHORITY OF ITS OWN ARCHIVES AND THE SUPREME COURT OF ILLINOIS HAS DECIDED THAT THE 'WELL BOUND BOOK' IS THE OFFICIAL JOURNAL AND PRIMARY EVIDENCE."

*Ryan* v. *Lynch*. *Miller* v. *Goodwin*.

Whether this court shall be as well satisfied with these *authorities* as the counsel seem to be remains to be seen.

Despite this assumed confidence, there would, however, appear to be in fact a deep-seated consciousness on the part of counsel that whilst nominally appealing to the authority of these cases, that ground has been swept from under them, and that the questions here must be answered, and will be answered by this court, wholly regardless of any such assumed authority.

THE QUESTION UPON THE VALIDITY OF THE ACT OF FEB. 18TH, 1857, NARROWS ITSELF TO A QUESTION OF WHETHER THE WELL-BOUND BOOK FROM WHICH THE CERTIFICATE OF THE SECRETARY OF STATE, OFFERED IN THE COURT BELOW, WAS MADE, WAS PRIMARY EVIDENCE OF THE CONTENTS OF THE SENATE JOURNAL OF 1857?

We assert that this question is disembarrassed of all authority other than the constitution and statutes of Illinois and common law rules of evidence applicable thereto.

The constitution provided "that each house should keep a journal of its proceedings."

We insist that it was not competent for the Legislature to discharge or relieve either house of this duty.

We insist that the journal of a parliamentary body is that document or narrative in writing of its proceedings prepared or kept by the house itself, or some officer or clerk appointed by such house, and under the control and supervision of such house, and that nothing else in the very nature of things could be the journal of such a body, and that it was not competent to make anything else the journal of such body; and we further insist, both upon authority and principle, that unless that journal so made and kept under the authority of the house, whose journal it professes to be, *is in existence*, and its production or a certificate therefrom

disproves the passage of an enrolled and published law, then the high presumption afforded to the enrolled law is superior to and overcomes any presumption arising from any class of secondary evidence, as to the contents of the original journal.

It will be noted that these clear propositions elaborated in our principal brief, are not answered by the brief we are now considering otherwise than by indirection.

The challenge of our brief was square and direct to the proposition, that the presumption accorded in favor of the enrolled act was such as should, upon principles of evidence as well as public policy, rebut and overcome presumptions arising from any class of secondary evidence.

The brief we are considering, while nowhere taking issue upon this proposition, devotes large space to the question of authorities to the effect that the "printed journal" *is evidence*.

Now, although the Supreme Court of Illinois said in *Railroad Co. v. Wren*, 43 Ill. 79, that it was not aware of any law making the printed copies of the journal evidence of the original, we, nevertheless, in our brief admitted that printed copies of the journal published in the course of official duty, was a class of secondary evidence, sufficient to raise *prima facie* presumptions, and so, too, would this be true of the copy made by the contractors in the "well-bound book," although they failed to prove it as an examined copy, yet having been made in some sense under official supervision, it might be admitted to that grade of secondary evidence, held sufficient to raise *prima facie* presumptions as evidence, and so any character of parol evidence was ordinarily sufficient to raise presumptions as to the contents of a lost writing of any description.

But the material question to which we invited attention in our brief was, whether this class of secondary evidence, either in writing or in parol, although sufficient ordinarily to raise these *prima facie* presumptions of a lost or destroyed original writing, was to be received as sufficient to rebut the presumption accorded to an enrolled law; or in other words, whether the presumtion in favor of the enrolled act did not, upon principle and authority, rebut all presumptions arising from any other class of evidence, than the primary evidence of the original journals.

This we argued both upon the authority of *Spangler v. Jacoby*, and upon principle.

Upon this proposition the brief we are considering is also strangely silent.

We may be pardoned for saying, however, that the brief we are considering, betrays a consciousness on the part of its author, that it is unsafe to rely upon this species of evidence, and that after all there is more encouragement in following the lead of *Miller v. Goodwin* in boldly maintaining that the *copy* in the well-bound book is the *original journal*, however paradoxical it may appear.

The incongruity of such a proposition does not appal the counsel. Doubtless he argued with himself that although this bold absurdity was now stripped of the support of *Miller v. Goodwin*, as authority, yet there was *color* of authority in that case, and ingenious reasoning would supply deficiencies. And so to the narrow question we come at last:

WAS THE COPY IN THE WELL-BOUND BOOK THE PRIMARY JOURNAL OF THE SENATE?

It is scarcely necessary to dissect the extremely artificial argument made in support of the affirmative of this proposition. The absurd outcome and result sufficiently exposes it.

We have asked heretofore, but have been unable to get an answer to the question, if this copy in the "well-bound book" is to be held the primary journal of the Senate, what is to be the result if a comparison of that copy with the original journal, the "cap paper journal," if you please, discloses a variance—the "cap paper journal" showing an act to have been passed by yeas and nays, but the "well-bound book" not showing it. Which is to prevail? Which is the primary evidence? We have asked in vain for an answer to this question.

We have seen that the statutes of 1833–1845, then and at all times thereafter in force, required that the journals kept by the officers of the two houses should be deposited by these officers in the Secretary of State's office, and by the same act it was made the duty of the Secretary of State *to safely keep and preserve the same in his office.*

We have seen that this has always been the law with respect to the duty of depositing and safe keeping the journals of the two houses, *regardless of whether they were kept by the officers in binding* or in "cap paper" without binding. The duty was always, however it might be kept, to deposit the primary journal with the Secretary of State, and the duty was always on the Secretary of State to preserve and safely keep the original journal so deposited in his office. From that statutory duty no *misusage* in his office could discharge him. Why was this original so to be kept and preserved? Manifestly that it might be appealed to always, as the primary and highest evidence of its own contents.

A copy of this journal so returned as the Senate journal to the Secretary of State, was required to be made and kept in the Secretary's office. This copy was not required to be made by any officer of the Senate or officer of the State, but by any contractor who would do it for the least money. The Secretary of State was not even required to compare it with the original or to certify it in any manner.

Yet the argument is, that this copy so made was the "primary journal," and that it superceded as primary evidence the "cap paper journal"—original journal—although it might be in existence, in the office of Secretary of State.

Although the finding of the court below in this case is, that the journal kept and completed, and returned by the officers of the Senate to the Secretary of State was lost or destroyed, and consequently that the certificate of the Secretary of State given in evidence below, was not from that journal, yet counsel persist in claiming, contrary to the finding of the court, that the primary journal of the Senate *is in existence*, and that the certificate of the Secretary of State was from the *primary journal*, and not from a professed or supposed copy of the journal.

Counsel seem conscious unless this position is maintained the case is against them.

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## A QUESTION OF LEATHER AND BINDING.

The maintenance of the strange and paradoxical proposition contended for is made to depend, not upon elementary rules of evidence, but upon a question of *leather and binding*. A dissec-

tion of the ingenious argument in the brief we are considering, leading, as we have seen, to such untenable results, will discover that it is built upon egregiously erroneous assumptions.

The first of these assumptions is based upon the act of the 16th of January, 1886, providing for keeping the journals in "well bound books." The assumption is made and upon that the argument is built, that by virtue of this statute it became an indispensible requisite or qualification to the character of a "Journal," that it should be kept or preserved in a "well bound book"—that the "binding" was an essential qualification before any document kept by the houses could be called their "Journal." Now if this is a total misapprehension of the effect of that statute the whole argument falls to the ground, and with it the equally erroneous dependant assumption that the "binding" being the true "journal" requisite, we must look for the "Journal" in some instrument that was "bound" whether it was made by the senate or made by parties wholly irresponsible to that body.

Disregarding the fundamental proposition that nothing, in the very nature of things, could be the Journal of a body, which that body had not sanctioned as their Journal, counsel lead off on a blind trail for "well bound books." No document without "binding," nay, no document "poorly bound" will, in their eyes, fill the description of a "Senate Journal." According to their view of the matter, the only proper impeachment we could have made of the certificate from the Secretary of State's office, was by evidence showing that the certificate was not given from a "well-bound book" but from a book very "*poorly bound.*"

Returning, however, to the fallacy upon which this argument is based, we inquire whether the act of 1886 can possibly be construed as assumed. Were its provisions other than merely directory

in their character? If either house omitted the direction, did the document which they kept of their proceedings, although in "cap paper packages" only, become any the less their Journal? Was it no Journal if so kept in "cap paper packages," and was there no record of their proceedings if not bound in a book? Such was the effect of that act as argued by defendant's counsel.

The patience of the court must be sufficiently tried with the mere statement of such a proposition. We could not expect to be tolerated in consuming time with the refutation where the refutation stands so patent to the legal mind.

But upon this false assumption that such was the effect of the act of the 16th of January, 1836, is interwoven a history of the manner actually adopted by the two Houses in keeping their Journals; this we suppose for furnishing plausibility to the theory that nothing could be a Journal not kept in a bound book, and although it might be but a copy, yet that it was the received habit of regarding such a copy if put into a bound book as the original Journal. In this history we are informed that from an early day the practice of each house had been for the clerk of the House and secretary of the Senate to transcribe during the session the original draft of the Journal into a "well-bound book—that this was the practice up to 1840, at which period each house chose a copyist who was thus to transcribe the original draft, and that this was the practice up to the adoption of the constitution of 1848. *To this history should have been added, however, the facts that this work of transcribing the original draft went on during the session pari passu with the original draft under the supervision of each house, and of course this transcribed draft thus made, although called a copy was in law and fact a duplicate journal; and being thus adopted by each house as its journal, it became both in law and fact an original*

*journal, and was so returned as an original journal to the Secretary of State's office.* Thus it will be seen that this journal, though called a copy, was made under the supervision of each house by an officer of their own, and by their acts in returning it to the Secretary's office as their journal, it was in fact their journal. These are the journal records found in the Secretary of State's office back of 1848, and are strictly and properly the original journals of the houses, and in the cognomen of the Secretary's office were known as the "Journal Records." (See the fourteenth finding of the court.)

We thus see the starting point of defendant's argument. Here were records made by *copyists* from the original draft of the journal, always regarded as the "original record of the journal," both by the houses and by the Secretary of State; but the argument entirely omits to note the facts connected with the manner of making these "copies," which in law and fact constituted them originals—the fact that they were made by officers of these bodies during the session, and were returned with the sanction of these bodies as their "original journals." Overlooking this essential particular, however, the argument proceeds: After the constitution of 1848 went into force, the act of 1849 was passed requiring the *copying* to be done by the lowest bidders, under contract let by the Secretary of State, and after this act went into force neither house kept copyists to copy their original drafts of the journal into a bound book, but simply returned their original drafts (journals) to the Secretary's office. The argument, building itself still upon the error that nothing could be held or treated as a journal not copied from some original draft and not found in "a well bound book" (per force of statute of 1886), having arrived at this point, scouts and rejects the idea that these original

journals in "cap paper packages," are to be held or treated as the journals. Why not? First, because they have not been copied; second, because they have not been copied into a "well bound book." A further reason, however, is adduced, and great stress laid upon it. The Secretary of State, the printers and copyists all treated these original drafts with great irreverence; they took no care of them; they did not consider them of any importance after they were copied into the "well bound gilt edged books" labeled "journal records."

But, as remarked before, the argument of defendant's counsel, building itself upon the assumption that nothing could be a journal unless it was found in a "bound book," and failing to find this "bound book" in these unpretending "cap paper packages," although they were returned by the two houses as their journals in fact, something in a "well bound book" must be looked for. Upon examination of the law of 1849, they find that the "journals" were to be copied into "well bound books" (mark the language—the "journals" were to be copied) by contractors under the Secretary of State, and here the discovery is made of the original journals. They are mere copies, it is "true; but they are in 'well bound books,' which is the one essential thing." It does not occur to the gentlemen that unless these "cap paper packages" were already "journals," they were not the documents directed by the statutes to be copied.

Counsel then argues that he has shown by the act of 1836 the journal was to be kept in well bound books; that he has shown the practice before 1848 was for each house to cause the original draft of the journal to be copied into a well bound book, which was returned by each house as its journal. He has thus shown that a copy from the original draft, put into a well bound

book, had always hitherto been regarded as the original. He considers that he has thus demonstrated that the mere circumstance of a copy having been made from an original draft was wholly immaterial to the character of the document as an original, and having brought the argument up to this point, counsel feels himself prepared to span the awful chasm, in some way yet to be got over, i. e.: How a copy not made under the supervision of the Senate or House, or by the officers of either, can be treated as an original.

Here was an appalling difficulty; at least it would have been appalling to lawyers of less nerve and ability than the learned counsel for defendants. The chasm had to be bridged over in some way. Counsel could not but see the absurdity involved in holding a legislative body responsible for a journal, neither made by it nor by clerks or officers whom it could supervise. The difficulty had to be met in some way, however; and that we may do the eminent counsel no injustice in our statement as to how it was met, we copy his own language from his brief in the court below: "The suggestion that this well bound book, containing the journal of 1857, is not made by an officer of the Senate, is untenable. A copyist from 1840 until 1849 was elected by each house for itself. When the constitution of 1848 required that the General Assembly shall provide by law that the copying the journals shall be let by contract to the lowest bidder, and when the Legislature in 1849 provided that the Secretary of State should let the contract to the lowest bidder, and should furnish a well-bound book in which the journals shall be copied, and when the Secretary of State did so let the work, the *contractor thereby became an officer under the law and quo ad hoc an officer of the Senate*, and the Senate in that mode performed the

duty imposed upon it by the constitution to keep a journal, and did so in conformity to the other requirements of the constitution, that the work of recording the proceedings should be done by the lowest bidder."

We notice only a few of the absurdities here enunciated.

First—"And when the Secretary of State did so let the work, the contractor thereby became *an officer under the law*," &c.

When a lawyer sets himself seriously to work to prove *a professed copy* to be *an original*, we are not to be surprised at any legal proposition he may enunciate. How does a contractor for doing copying for the State become an OFFICER? What legal classification ever classed a contractor for public work as an officer? Are the persons who furnish the wood, the paper and the stationery for the State under this same law by contract, officers? Clearly no more officers than are ordinary employes by the day or job, to repair the desks and furniture of the State House—no more officers than the employes who do the sweeping and cleaning.

But the argument required that this assumption should be made, and so they are boldly assumed to be OFFICERS. But this was not the only assumption the argument required. The argument required not only that these contractors should be officers, but that they should be *officers of the Senate*, and counsel having by this time habituated themselves to the business of assuming whatever was necessary to be assumed, now, without hesitation, take this bull by the horns, and declare "that when the Secretary did so let the work the contractor thereby became an officer under the law *and quo ad hoc* an officer of the Senate." *Quod est demonstrandum.*

The thing to be demonstrated was, how a *professed* copy of the Senate journal of 1857, made by contractors under the Secretary of State, weeks after that body had adjourned, could in fact and law be the original Senate journal—how this copy thus made could be made to appear the primary and highest evidence of their proceedings, and entitled to higher consideration as evidence than any mere "cap paper original draft," that the Senate may of itself deliver to the Secretary of State as its journal; and we believe we have faithfully abstracted the argument by which counsel have attempted to sustain the proposition. Having simply pointed out wherein this whole argument was baseless, we forbear further comments upon it. The starting point that the statute of 1836 made the keeping of the journal in a "bound book" an indispensable requisite to a journal—the further position that the usage of the houses in having their original drafts copied by their own copyists during the session and their returning this copy as their original journal, are equally baseless as arguments for the position—that the copies made after the session by a contractor are to be held as the original journals. We only ask the court further to note the culminating points of the argument, which if utterly untenable and unsound topples over the whole argument, to-wit: the assumption that the contractors under the Secretary of State for doing copying work were officers, "*and quo ad hoc officers of the Senate.*"

Certainly a more plausible and less objectionable mode for counsel to have stated their case would have been to frankly acknowledge that the "well bound book" was, in truth, a copy only of the journal, but the purpose of the legislature was to make a copy preserved in binding *constructively* the journal, i. e.; that this was to be taken as the original *constructively*. This would have been a frank statement of their position.

Unfortunately the statutes upon the question did not permit of so fair a statement of their position.

The legislature had required the safe preservation of the original journal deposited by the Senate officers in the archives of the State department—thereby manifesting at least equal solicitude for the preservation of these originals, as for the preservation of the copy.

The act providing for a copy to be made, had in no line of it manifested an intent even to make this copy evidence for any purpose, much less that it should supercede the original as being the "journal."

We have admitted that it was fully competent for the legislature to declare rules of evidence, and that it could have declared this copy to be not only evidence of the contents of the original journal, but conclusive evidence of the original; but we have seen that the legislature carefully refrained from any such expression; and we have further seen the reason why it did not, and would not make it evidence for any purpose.

Upvn the whole case, therefore, as far as this question is concerned, we think it manifest that the act of Feb. 18th, 1857 must be held valid, unless—

1st. It appears to the court that the "well-bound book" is the primary evidence of the Senate journal of 1857, or

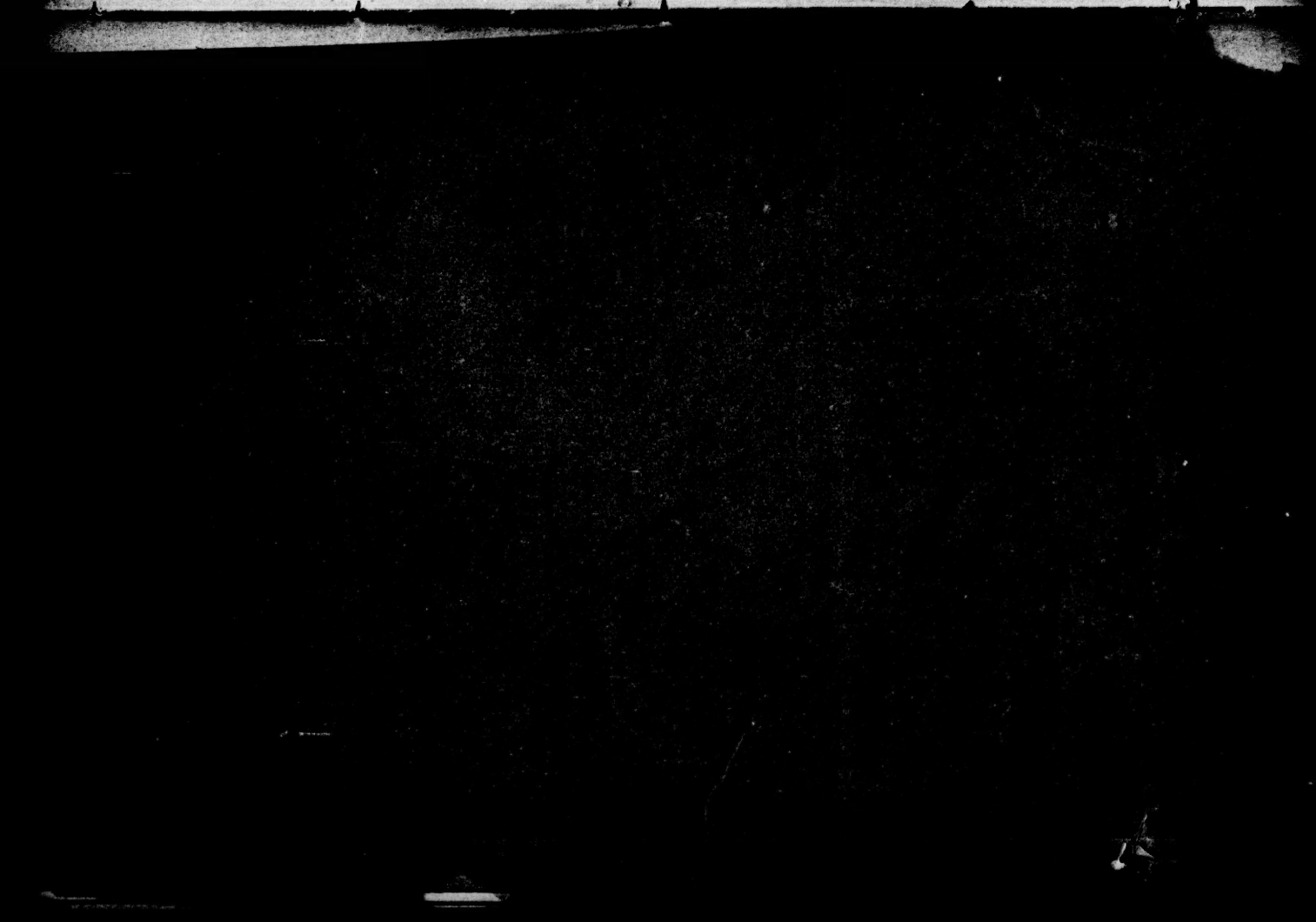
2d. That although it be not the primary evidence, yet by virtue of statutory provisions it has been declared to stand as and for the original journal; or

3d. That by statute its contents have been declared evidence of the original journal.

And we repeat here that in vain will the statutes be searched for support for either of these propositions.

And we conclude this branch of the case by suggesting that the proper solution of these questions depend upon common law principles of evidence in connection with the statutes cited, and not upon *Miller v. Goodwin*, or the usage or misusage of the Secretary of State's office. In fact the simple question here is, shall plain recognized rules of evidence under the statutes quoted, and under the common law, be applied, and the just rights of these bondholders be saved, or is a violent and artificial construction to be applied to subvert and defeat justice and right.

M. HAY,
D. T. LITTLER,
*For Plaintiff.*



OFFICE SUPREME COURT U.S.
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JAMES H. McKENNEY, Clerk

IN THE

# SUPREME COURT OF THE UNITED STATES.

POST

No.---------- *v.*

KENDALL COUNTY,

AND

AMOSKEAG NATIONAL BANK

No.---------- *v.*

TOWN OF OTTAWA.

## REPLY TO BRIEF AND ARGUMEMT OF P. PHILLIPS,

—BY—

MILTON HAY AND D. T. LITTLER.

SPRINGFIELD, ILL.:
H. W. ROKKER, PRINTER AND BINDER.
1882.

IN THE

# SUPREME COURT OF THE UNITED STATES.

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POST

*v.*

KENDALL COUNTY,

AND

AMOSKEAG NATIONAL BANK

*v.*

TOWN OF OTTAWA.

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## REPLY TO BRIEF AND ARGUMEMT OF P. PHILLIPS.

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At this writing we have been furnished only with the brief and argument of Mr. Phillips in these causes, and hence can reply briefly only to the positions therein assumed.

In our opening brief we discussed fully the question as to the authority claimed for the cases of *Ryan* v. *Lynch* and *Miller* v. *Goodwin*, taking the position that these cases were essen-

tially *ex parte*, and that the cases were wanting in those conditions requisite to make any judgment or opinion rendered therein *authoritative* in another Court, founded upon the objection that indispensible parties to the controversy were not before the Court.

As this view of these cases had not hitherto been discussed or presented to this Court, it must have been apparent to counsel that unless it could be successfully answered, the claim made for those cases as being binding upon this Court must be abandoned. But more than this would necessarily result from such impeachment of the authority of those cases. The case of *South Ottawa* v. *Perkins*, 94 U. S., (we refer to the majority opinion) was based solely upon the controlling authority of these cases; and if this Court, upon examining the cases in the light of the objections now raised to their authority, shall conclude they are without binding authority here, it will then necessarily follow that what has been said by this Court in *South Ottawa* v. *Perkins*, following the supposed authority of these cases, can no longer be insisted upon as precluding its judgment now upon any of the points in controversy.

As counsel for defendants must have necessarily understood these results to follow the successful impeachment of these cases in the point of their authority, we expected, at least, an effort from counsel to make a plausible reply to the impeachment.

A reply is indeed attempted in the brief before us, but it is wanting even in plausibility. It does not meet the objections.

Mr. Phillips replies:—(See pp. 29–30 of his brief.)

First. "The answers in the case (*Miller* v. *Goodwin*) show that the rights of the bondholders were set up and argued." But the

material question is, were they so set up and argued by the bondholders for themselves, so far as the record discloses? That the tax officers may have voluntarily, in good faith even, taken upon themselves the task of setting up the rights of the bondholders, in no wise meets the fundamental objection that they, the bondholders, should have had the right and opportunity to be heard for themselves.

Second. Counsel further replies: "It will be seen by an inspection of the record (of *Miller* v. *Goodwin*) that although the answer is made by the tax collector, it was evidently prepared in the interest of the bondholders, and by counsel employed by them."

A diligent inspection of that record fails to make either of the facts alleged apparent to us, and even were it made so apparent, we fail to discover how this would overcome the essential difficulty arising from the bondholders not being parties to the record; that upon their standing as parties they might have the opportunity of not only being heard, but of managing the cause as they might feel their interests required.

But again Mr. Phillips replies:

"W. H. Miller was examined as a witness in the cause, *and on cross-examination admitted he was then the holder of coupons for one year's interest.*" And again counsel shows from the record that this W. H. Miller executed the appeal bond, under which the case was taken to the Supreme Court.

Now, "W. H. Miller" was not the tax collector Martin B. Miller, who was the party to the suit. W. H. Miller, the witness referred to, "and who held some of the coupons," was not a party to the suit, and had no control over it whatever. Clearly, the difficulty, is not met by these suggestions of the brief.

It is said, however, in the brief of Phillips (p. 16): "In *Elmwood* v. *Marcy*, (92 U. S. 289) we have a case in all particulars like the one before us."

Counsel here quotes from that case the citation made therein to the two Silliman cases, 61 Ill., 218—62, 170, in which tax-payers were complainants and the tax officers were defendants, which the Court holds itself bound to follow as authority, notwithstanding the Court might differ from the reasoning.

The bondholders were not parties in the Silliman cases. But an examination of the record in the *Elmwood* v. *Marcy* case, shows that the point was nowhere raised or discussed in that case, as to whether there was a defect as to parties in the Silliman cases, which would deprive them of the *status* of authorities.

That point not having been presented or discussed in the *Elmwood* v. *Marcy* case, counsel can take nothing from that case, by way of argument, to preclude this court from now adjudging upon the question in the light of principle.

It is said that the argument upon this question (the authority of *Ryan* v. *Lynch* and *Miller* v. *Goodwin*) was before this court in the former case of *Perkins* v. *South Ottawa*.

This is an error of counsel. In that case the fact that the bondholders were not parties in the cases of *Miller* v. *Goodwin* and *Lynch* v. *Ryan*, was referred to in disparagement of their weight as authority. But the position now taken that they were not authority in any sense, by reason of the requisite conditions as to parties being wanting in the records, is here for the first time presented.

The truth of the matter is, counsel for plaintiffs in these cases were imposed upon by the quotation of authority made by the

court in the case of *Ryan* v. *Lynch* (cited in our brief) as to the rule allowing a dispensation of parties, and it was not until after the case of *Perkins* v. *South Ottawa* had been submitted and decided here, that our own inquiries were directed to the investigation of the foundations for any such rule as to the dispensation of parties as was laid down in the cases of *Silliman*, and *Lynch* v. *Ryan*.

The strong protest against the assumed jurisdiction uttered by Justice Walker in the case of *Marshall et al.* v. *Silliman*, 61 Ill. 228, first directed our attention more fully to the question. In that case, dissenting from the court, he said:

Mr. Justice Walker:

"I fully concur in all that is said in reference to the constitutional power of the town to vote the subscriptions; but, inasmuch as the present holders of the bonds are not parties to the bill, and as they have a direct interest in the tax sought to be enjoined, I think the decree of the court below should be affirmed for the want of parties. *I therefore refrain from the expression of any opinion as to the regularity or validity of the election, or the issue of the bonds, and think the decree should be affirmed.*"

*Marshall et al.* v. *Silliman et al.* 61 Ill. 228.

Independent of the cases, however, of *Silliman*, *Ryan* v. *Lynch* and *Miller* v. *Goodwin*, the Supreme Court of Illinois had settled that an act of the legislature was impeachable as a law, by showing from the journals that the act had not passed according to constitutional requirement; and if the position maintained by us in the case of *Perkins* v. *South Ottowa*, (94th U. S.) and concurred in by the minority of the court, that an estoppel existed in behalf of the bondholders, be yet held untenable by the court, the cases now before the court would present the simple question, (so far as the validity of the bonds rested upon the Act of 18th February, 1857) whether it appears *from the journals of* 1857 *that the* act did not pass as required by the constitution.

And this court is now fully remitted to make this inquiry free and disembarrassed from the hitherto supposed authority of the case of *Miller* v. *Goodwin*.

Having gone over this whole question at length in our brief in chief, we may be excused for a short recapitulation of the points of the argument.

First.—The Supreme Court of Illinois, in the leading case, (ever since adhered to) held as follows:

> "The presumption indeed is, that an act thus verified (by the signatures of the speakers and approved by the governor) became a law pursuant to the constitution, but that presumption may be overthrown. If the journal is lost or destroyed, this presumption will sustain the law, for it will be intended that the proper entry was made on the journal. But when the journal *is in existence*, and it fails to show that the act passed in the mode prescribed by the constitution, the presumption is overthrown, and the act must fall."
>
> *Spangler* v. *Jacoby*, 14 Ill. 302.

## PRESUMPTIONS COMPARED.

In our opening brief (p. 66-7-8) we have, we think, demonstrated that the court, in *Spangler* v. *Jacoby*, *supra*, employed the language quoted advisedly, and upon full consideration of the weight and signification of every part of it. Without repeating it, our argument was and is, that not only upon grounds of sound public policy, but from sound principles governing evidence, the presumption in favor of an enrolled law, signed by the speakers of the two houses and the governor, and published to the world as a law, ought to outweigh any presumption arising from any secondary evidence, of any class, brought forward to impeach it, and that upon this all sufficient consideration, all attempts to impeach the Act of February 18th, 1857, by any class of secon-

dary evidence, should be rejected, not only upon the authority of *Spangler* v. *Jacoby*, but upon public policy and the soundest reasoning upon the nature of the evidence.

In this connection we again repeat, that in no case has the Supreme Court of the State of Illinois, itself, ever allowed an act to be impeached by any evidence short of what *they held to be the primary evidence afforded by the original journals.* In *Miller* v. *Godwin*, the struggle on the part of the court to overcome the act was to maintain that the *copy* in the well bound book, was the original and primary journal.

So, that not only the express holding in *Spangler* v. *Jacoby*, but the uniform practice of that court, as well as sound principles of evidence and public policy, are against the reception of any other than the primary and highest evidence, to rebut the high presumption accorded to an act published as a law.

This consideration renders unnecessary any further scrutiny of the evidence relied upon as proving that the "well bound book" was, in any event, a *copy* of the original journal. It is to be noted, however, that there is no finding of the court, whatever, that goes near the extent of finding that either the "well bound book" or printed copies, are copies of the original journal. The court gives the facts found, but, evidently, declines to draw or find, as a conclusion, any such fact as that these were, in fact, copies of the original.

We have admitted, that, although it stands *unauthenticated*, according to common law rules, either as a sworn or examined copy, (page 64 of brief,) yet, that probably both this and the printed copy, as shown by the findings, might be admitted to that low grade of evidence permitted for the purpose of raising a presumption, to-wit: acts performed in the course of official duty,

yet this would still be successfully met by the higher and stronger presumption offered in favor of the act.

In the light of the foregoing considerations, it will be at once perceived, that the whole question on the act of February 18, 1857, is reduced, as before stated, to the simple inquiry of whether the book from which the Secretary of State gave his certificate was the primary journal of the Senate, or whether it was only a *professed copy* of an original journal.

The finding of the court below settles this question for this court.

The court finds the senate journal of the session 1857 to have been lost or destroyed, (see 11th finding). The further finding is, that the book from which the Secretary made his certificate, was from the purported copy in the "well bound book." Unless, therefore, by force of some statute the purported copy is made to stand either as or in *lieu* of the original, or is made evidence as a *copy* of the original journal, the argument would seem to be ended.

We have seen that the statute providing for copying the journal into a well bound book, made no provision whatever as to the force or effect of this *copy* so made. In not a line or a sentence of that statute is there a word as to the *status* of this copy. It is nowhere hinted at that it is to stand for and supersede, as primary evidence, the original from which it is copied, nay, more than this, it does not provide *that it shall, under any circumstances, be evidence of the contents of the original journal, even of a secondary character.* No statute ever provided for a certificate to be given therefrom.

We have seen that the statute then, and at all times, in force, (see statute of 1845), required of the Secretary of State *the safe*

*preservation of the original journals* in his office, and provided that the secretary of State might certify therefrom. No statute ever allowed a certificate to be given from the mere *copy of anything* on file in the secretary's office. (See statutes set forth.)

The statute having thus provided for the depositing of the original journal in the secretary's office, and for its safe keeping in that office, we can see why it was that the law made no provision whatever in regard to the *status* of the *copy* as evidence.

In contemplation of the legislature, the original journal was always to be safely kept to certify from, or answer all demands of evidence.

The statute providing for this copy did not even provide for a careful comparison of it with the original, or throw any safeguards around it with the view of making it evidence for any purpose.

In view of these co-existing statutes, we can conceive of no deduction more wild to be made from the premises than that made by the court in *Miller* v. *Goodwin*—that it was the intent of the statute to make this copy stand for the original journal—when it is considered that the law then in force, and continued in force, expressly provided that the original should be safely preserved, as a means of evidence, and when no such intent is expressed or apparent from the act providing for this copy.

The authority of *Miller* v. *Goodwin* overthrown, its reasoning, in view of the statutes existing on the question of the journals, will not stand the least investigation.

The brief of Mr. Phillips enlarges upon the findings of the court to the effect—that after the original journals were copied

"no care was taken to preserve them," and that by usage in the secretary's office these copies were treated as the original journals of the Senate.

We have, in our opening brief, exposed the fallacy of this position, and have shown that these findings are necessarily inconsequential. A usage in the secretary's office in disregard of the statutes can neither make evidence nor law.

## THE RECORD IN MILLER V. GOODWIN.

The record, in the case of *Miller* v. *Goodwin*, is exhibited here for the purpose of showing that the evidence as to the journals there was the same substantially as here. But the *findings* from that evidence are essentially different in that case, from the *findings in this*.

There, the *finding* was of *mere memoranda* for a journal, incomplete minutes made by the Senate officers. Here the *findings* are of a *completed journal* made by the Senate officers.

As counsel have taken the liberty of quoting from that record and setting out some of the evidence therein, we may be indulged in following his example.

We were curious to find what evidence in that record justified the court in finding the Senate journal deposited in the office of Secretary of State to be merely "minutes for a journal," and lo! we found it.

On pages 72, 73 and 74 of that record will be found the testimony of one Thomas C. Jewell, a deputy clerk of the Secretary's office, and who, it seems, made the certificate in *Lynch* v. *Ryan*. He says:

"Such certificate was made by me as clerk for the Secretary of State. The certificate was based upon what is known in the Sec-

retary of State's office as the original journal, *the same being a copy of the minutes made by the clerk of the Senate.*" Then follows, in the same connection and sentence, "it being *a copy of the journal*, made according to the law providing for the copying of the laws and journals."

Disregarding the context of the witnesses' testimony, the court seize upon the expression "copy of the minutes," and upon that characterize all the evidence as to the manner of making up the Senate journal.

A further extract from this record:

George Harlow, the Secretary of State, is examined. [P. 84 to 87.]

The "well-bound book" shown him. Ans. p. 85.

"From my *knowledge of the law and custom*, I should judge that they were simply copies made *from the original journals furnished* by the secretary of the Senate as provided by law."

Again—p. 85. Question—"From your present knowledge would you now, as Secretary of State, certify from those books as original journals made by the secretary of the Senate?"

Answer—"I would not, but would certify from them as accepted copies of the original journals."

The reading of the depositions of Harlow, Jewell, Hatch, and Latshaw will repay perusal, as showing how small the pretext was for the finding of the court—that the original journal was in fact "mere minutes."

But we are confronted with the spectre of a dire calamity if these "well-bound books" are held to be merely unauthenticated copies of the original journals.

Says the brief of Mr. Phillips:

"As it is found that these 'cap paper journals' were never preserved, after they were copied into the books, until 1872, it follows from the position assumed by plaintiff in error, that no act of the Legislature can now be challenged successfully for want of compliance with constitutional requirements."

A calamity, truly!

These journals are resorted to, it appears, for no other purpose, and answer no other purpose, than to defeat laws, upon the faith of which millions may have been invested in money or property —used, in fact, for no other purpose than as aids of repudiation and dishonesty.

Unfortunate it is, indeed, if by a righteous decision of this court, upon sound principles of law, they can accomplish that end no longer!

We repeat, that it would be grievous if by the production of the highest evidence this court were compelled by force of law to yield to such iniquity.

But to ask this court to yield in the absence of compelling law, and against law, is asking too much.

Independent of the Act of 18th of February, 1857, however, the court will find abundant authority for the issue of the bonds in controversy under the additional acts set forth and relied upon in our opening brief.

The positions assumed by Mr. Phillips in answer to these, do not meet their effect. His attempted reply will be found to be based largely upon a misunderstanding of the facts as to dates, and the points involved in the authorities cited by us from the cases hitherto decided by this court, which will be pointed out and exposed upon the oral argument.

Nor do we think it necessary to rehearse the principles and authorities advanced in our opening brief, as well as the position assumed in the dissenting opinion in *Perkins* v. *South Ottawa*, showing and demonstrating the principle of estoppel to be fairly applicable to the cases made by these records.

M. HAY,
D. T. LITTLER,
*Counsel for Plaintiffs in Error.*

APR 1 1882
JAMES H.

IN THE

# Supreme Court of the United States.

OCTOBER TERM, A. D. 1881.

THE AMOSKEAG NATIONAL BANK,
*Plaintiff in Error.*

vs.

THE TOWN OF OTTAWA,
*Defendant in Error.*

No. 226.

## *BRIEF ON BEHALF OF THE PLAINTIFF,*

BY

G. S. ELDREDGE

CHICAGO:
TOLMAN, NEWELL & Co., PRINTERS,
1882.

# SUPREME COURT

## OF THE UNITED STATES.

October Term, A. D. 1882.

THE AMOSKEAG NATIONAL BANK,
*Plaintiff in Error.*

*vs.*

THE TOWN OF OTTAWA,
*Defendant in Error.*

No. 235

## BRIEF ON BEHALF OF PLAINTIFF IN ERROR.

By G. S. ELDREDGE.

It must be conceded that the act of the legislature of Illinois of February 18, 1857, under which the bonds in suit were issued, is presumptively, to say the least, a valid law. It is clothed with every *indicia* of genuineness, whether considered as authenticated in pursuance of the act of Congress with respect to proof of the statutes of the several States, or as in conformity to the constitution and law of the State of Illinois.

*The provisions of the constitution of Illinois of* 1848, *in force when the act purports to be enacted, material to be considered in this connection, are as follows:*

"ART. III, *Sec.* 1. The legislative authority of this "State shall be vested in a general assembly, which shall con- "sist of a senate and house of representatives, both to be "elected by the people.

"SEC. 13. Each house shall keep a journal of its pro- "ceedings, and publish them. * * * *

"SEC. 21. On the final passage of all bills, the votes "shall be by ayes and noes, and shall be entered on the journal; "and no bill shall become a law without the concurrence of a "majority of all the members elect in each house.

"SEC. 23. * * * Every bill having passed both "houses shall be signed by the speakers of the respective "houses. * * *

"SEC. 39. The general assembly shall provide by law "that * * * the copying, printing, binding, and distri- "bution of the laws and journals * * * shall be let, etc.

"ART. IV, *Sec.* 21. Every bill *which shall have passed* "*the senate and house of representatives* shall, before it be- "comes a law, be presented to the Governor: if he approve, "he shall sign it; but if not, he shall return it with his ob- "jections, to the house in which it shall have originated; and "if thereafter approved in each house by a majority of the "members elected thereto, it shall become a law, notwith- "standing the objections of the Governor. * * *"

The enrolled bill remains in the office of the secretary of of State, signed by the speakers of both houses of the general assembly, and by the Governor. The signature of the Governor to the act is the final authentication of the passage of the act in conformity to the provisions of the constitution of the State, as prescribed by that instrument, as shown by the provisions above quoted (see 3d and 4th findings, Record, p. 11). This act was duly published and promulgated as a law in force by authority of the legislature. With perhaps two or three exceptions, the uniform current of authorities in this country hold that an enrolled bill cannot be impeached by a resort to the legislative journals, irrespective of the fact as to whether any constitutional provision exists requiring the vote upon the final passage of the bill to be taken by ayes and noes and entered in the journal; as is shown by the authorities cited by Mr. Perry. See, also, *Sherman v. Story*, 30 Cal. 253; *Forke v. Fleming*, 13 Md. 412; *Green v. Waller*, 32 Miss. 650; *Brodnox v. Groom*, 64 N. C. 244; *State v. Swift*, 10 Nevada, 176.

It has always been held in England that an act of Parliament imported absolute verity.

*Rex v. Jeffries*, 1 Str. 446.
*Rex v. Rothbotham*, 3 Burr. 1472.
*Rex v. Arundel*, 1 Hobart, 109.
*The Princes' Case*, 8 Coke, 145 Co. Lit. 906.

*Nul tiel* record cannot be pleaded to an act of Parliament.

See Comyns' Dig. Tit. Parliament.

*The rule of decision to determine the existence of a statute in Illinois.*

But the Supreme court of Illinois nearly thirty years ago established a rule of evidence relative to the existence of a public statute different from that generally applied, viz.: that when a law is found among the published statutes of the State, the *presumption* is that it was duly passed in conformity to the constitution, but that a resort may be had to the legislative journals to show that it was *not* constitutionally passed, and the presumption of the existence of the law be thus overthrown.

*Spangler v. Jacoby*, 14 Ill. 299, decided in 1853, on an agreed state of facts.

This case was followed by *Turley v. Logan Co.*, 17 Ill. 152, decided in 1855, where it was alleged that the bill for the removal of a county seat had not been read on three different days.

An injunction was allowed restraining the public authorities, and resort was permitted to be had to the journals to show the alleged unconstitutional passage of the law, but at another session of the same legislature, *upon the recollection of members*, the journal was corrected, in February, 1854, after the filing of the bill, and the injunction was thereafter dissolved, because it was held competent for the legislature to thus correct its journals, and ratify that which from its journals appeared to have been incompletely done.

*Prescott v. Canal Trustees*, 19 Ill. 324, was decided in 1857. It was submitted upon an agreed state of facts. The agreed case shows that, in fact, the supposed law never passed,

and was never enrolled as a law. It was simply erroneously published among the public laws. But as there was *no enrolled bill* to support it, it of course had no validity, and it was held to be void.

In *People v. Starne*, 35 Ill 121, decided in 1864, the foregoing authorities are reviewed and the constitutional provision elaborately discussed and the rule announced in *Spangler v. Jacoby* adhered to.

In *Illinois Central R. R. Co. v. Wren*, decided in January, 1867, 43 Ill. 79, it was objected that the act giving the court jurisdiction had not passed by yeas and nays, and therefore never became a valid law, and the objectors referred the court to the *printed journal*, but the court replied "that the "laws certified by the secretary of state, and published by "the authority of the State, must be received as having passed "the legislature in the manner required by the constitution. "It is not sufficient to refer the court to the *journal*. with the "expectation that we are to take *judicial* notice of all the "facts that it discloses. We are not aware of any law which "makes the printed journal evidence of the contents of the "original. A duly authenticated copy of so much of the "*original journal* as shows the acts relied upon by the coun- "sel for impeaching a law *prima facie* valid must be brought "before us *by the record*. In *Spangler v. Jacoby* the journals "were made a part of the bill of exception, and in every case "hitherto the facts have been shown by the record."

In *Bedard v. Hall*, 44 Ill. 91, decided in 1867, it was insisted that the act conferring jurisdiction upon the LaSalle County court in Chancery cases had not constitutionally passed,

and therefore the court had not jurisdiction to entertain the bill, and reference was made by counsel on the argument to the printed journals. The court said, p. 93: "This act is "found among the published laws of that session and bears "the approval of the Governor, and *no evidence was offered in* "*the court below* going to show that the act was not passed in "conformity to the constitution; *we will not examine the* "*journals* for such purpose, but take it for true that the law "was constitutionally passed; we take *judicial notice* that the "law is found in the public statute books, and *no evidence* "having been offered to impeach it, *we will not look at the journal* "*now for the first time to impeach it.*" So the question was then treated as a mere question of *fact*, and not one of law, and the parties complaining were held to be estopped from showing by the journal that the law had not constitutionally passed.

If the appellants had then and there exhibited to the court an authenticated copy of the journal under the great seal of the state, showing that the law was not constitutionally passed, the court would then, under its own rule of decision, for the purposes of the pending case, have judicially pronounced it a valid law, and proceeded to adjudicate upon the rights of the parties, whether it had jurisdiction as shown by the journal thus offered or not.

At the next term of the Court in 1867, in *Grob v. Cushman*, 45 Ill. 124, it was sought to establish, by specific reference to the *printed journals* of the general assembly, that an act conferring additional jurisdiction upon the County court of LaSalle county was not constitutionally passed in this, that

the bill, after being introduced in the lower house, was read a first and second time under a suspension of the rules, referred to the judiciary committee (printed house journal, Ill., p. 710), and the committee recommended its rejection. (Ibid. 815.) The report of the committee was concurred in, and, on further motion, the enacting clause was stricken out; (the bill having passed in what was formerly known in the history of Illinois legislation as an "omnibus," embracing several bills, more or less), and thus to establish, under the previous decisions of that court, that the bill, being without an enacting clause, was passed contrary to Sec. 20 of Art. 3 of the Constitution of Illinois of 1848, and therefore void.

The Supreme Court of Illinois declined to "explore the journal," although it was urged that the court was bound to know what the law was, and especially upon the vital question of jurisdiction, and, per Walker, J., said (p. 124): "It is true the journals are public records, but it does not follow that they will be regarded as within the knowledge of the courts, like public laws, but, like all other records and public documents, they should be brought before the court as evidence. Until so produced they cannot be regarded by the courts. This is the rule announced in the case of the I. C. R. R. Co. vs. Wren."

It is here remarked, with reference to the question of *estoppel*, that the Supreme Court of Illinois, in this case and in *Bedard v. Hall*, and *Grob v. Cushman*, supra, applied this very doctrine of estoppel, as to questioning the existence of an alleged unconstitutional law, which was applied upon the trial of the case of *South Ottawa vs. Perkins*, 94 U. S. 260,

with this difference: In the latter case it was applied for the reason that it was held by the Circuit Court, that to allow the defendant to thus impeach a law presumptively valid, and upon the faith of which the plaintiffs had parted with their money, and for which the town had acquired the stock of the railroad company, would permit the defendant to gainsay that which it had solemnly affirmed to be true, and upon the sole *faith* of which the securities in question were purchased; whereas, in the Grob-Cushman case, it was applied upon the mere technical ground, that the *fact* that the law was unconstitutionally passed, and therefore void, was not sufficiently *pleaded* and *proved*. So, while the Supreme Court of Illinois apply the doctrine of estoppel as to the existence of a supposed public statute, upon mere *technical* grounds, and from an aversion to "exploring the journals" of the Legislature, it would not hesitate to permit a person to be deprived of his personal liberty or divested of his property, under a law alleged to have been unconstitutionally passed, if no proof was offered of the alleged defects in the law. Yet this application of the doctrine of estoppel is commended by our adversaries, while at the same time they complain bitterly, if applied in behalf of the *bona-fide* holders of commercial securities, and against the unconscionable attempts of their clients to defeat the collection of these securities purchased upon the solemn affirmation of the town that they were valid and for which it received a valid consideration, and still retains it.

*The People v. De Wolf*, 62 Ill., 253, decided in 1871, was a proceeding by mandamus to compel De Wolf to assume jurisdiction as a justice of the peace, under the act of the

Legislature extending the jurisdiction of justices, to matters where the amount did not exceed two hundred dollars, whereas their jurisdiction had previously been limited to cases where the amount involved did not exceed one hundred dollars, and the question was whether this act extending the jurisdiction of justices was a valid law.

It appeared from a return to the writ that an amendment to the bill was adopted by the Senate but that the House refused to concur in the amendment. The court, upon the facts alleged in this return, which were not traversed, held the bill to be invalid, and said (p. 259): "Our decision is predicated *solely upon the state of facts* set forth in *the return in the case, without an inspection of the journal of the Senate; and we pass upon the validity of the act in question no further than as affects the present application in view of the admitted facts in the case.*"

From the foregoing language of the court no other conclusion can be drawn than this: That upon another state of "facts," admitted by the record or proved to exist, this same court might hold that the law then in question was a valid law, and compel obedience to it as such, and would not be precluded by its prior adjudication with respect to the validity of the law.

Again, in *Larrison v. P. A. & D. R. R. Co*, decided at January term, 1875, Walker, C. J., in delivering the opinion of the court, says (77 Ill., p. 18):

"If we find a law signed by the Speakers of both Houses, and approved by the Governor, we must *presume*

that it has passed in conformity to all the requirements of the Constitution, and is valid, until the *presumption* is overcome by *legitimate proof*. And in such case the *evidence must be clear* and *convincing. It is by no means sufficient to only create a doubt whether the requirements of the organic law have been observed, but it must be clearly proved.*

"In this case we do not think that the proof offered to impeach this law has produced that effect, but it has failed to even cast a doubt on the proceedings by which it was adopted."

It will be seen from the foregoing decisions of the Supreme Court of Illinois that the existence or non-existence of a supposed statute is, beyond doubt, made dependent upon the proof in each particular case, and also upon the question as to whether the existence of the alleged law is controverted. And again in *Binz v. Weber*, 81, Ills., 291, decided as late as 1876, the Supreme Court of Illinois say: "The Journals are not regularly before us, but the parties have stipulated as to their contents, and we have considered the question as though *legally* presented by the Journals."

It is said by Mr. Justice Bradley in *South Ottawa vs. Perkins*, 94 U. S. 267, that it is "an intolerable state of things if a document purporting to be an act of the Legislature could thus be a law in one case for one party, and not a law in another case for another party. * * * A law to-day and not a law to-morrow; a law in one place and not a law in another, in the same State. * * * *Whether it be a law or not a law, is a judicial question to be settled and determined by the Courts and Judges.*" But, nevertheless, this

extraordinary state of things has existed in Illinois since the decision of *Spangler v. Jacoby* (supra in 1853) as the inevitable result of the doctrine promulgated by that Court of not determining the question as to the existence or non-existence of a public statute as a purely "judicial question," but simply as a matter of *fact*, as the Court would determine the existence of any other fact in issue. The plaintiff in this case is not seeking to induce this Court to adopt such a rule; it is simply asking this Court to protect it against the application to *this case*, of two decisions of the State Court, *founded upon this intolerable doctrine*, and against the binding effect of a rule sought to be applied to the case at bar, which would make an adjudication between A and B as a question of *fact*, as to whether a document is a law or not, founded solely upon just such evidence as A and B chose to introduce upon the question, *pro and con*; whereas by the very rule established by the Supreme Court of Illinois the determination of the matter as to the existence or non-existence of the law as such question of fact would *not bind B and C* in another controversy involving the same question of fact. This is very ingeniously sought to be done by our adversaries, but which, we most earnestly insist, cannot be done under the very rule of decisions which they themselves invoke.

In other words, our adversaries, being of course well aware that when this Court passes on a question as to the existence of a public statute, it determines the question as a *purely judicial question*, as in *Gardner v. The Collector*, 6 Wall, 499, they seek nevertheless to foist upon this Court, as authority, a determination of the question by the Supreme Court of Il-

linois, as a *mere question of fact*, upon the evidence only which the parties to the suit in two cases were pleased to present to the Court as the basis for its finding, but which decision, as before remarked, would *not be authority* in another case in Illinois between other parties involving the same identical question, and thus give this determination of *fact* the same effect here that would be given in this Court to a case like that of *Gardner v. Collector*.

The impropriety of this is apparent. The whole force of *Ryan v. Lynch* and *Miller v. Goodwin*, as authority in the pending case, rests upon the ability of our learned friends to convince this Court by their specious reasoning in this regard that these cases are *res judicata* upon the question that the act of 1857 never constitutionally passed.

In *South Ottawa v. Perkins*, 94 U. S., 297, it is said: "It would be an unseemly state of things after the Court of Illinois have determined that a pretended statute is not such, having never been constitutionally passed, for the Courts of the United States, with the *same evidence* before them, to hold otherwise." But in answer to this suggestion, it is submitted that this Court can hardly permit itself to be bound by the determination of the Supreme Court of Illinois upon a mere question of *fact*, thus determined. It is not a question of the construction of a constitutional provision, or of a local statute. The entire responsibility for this "unseemly" state of things rests with the Supreme Court of Illinois. If it were true that the Supreme Court of Illinois determined the question of the existence of a public statute of the State, as a purely judicial question, by a resort to all proper sources of information,

as in *Gardner v. The Collector*, and which under its own rule would bind all persons affected by it, the force of the remark of the learned Justice would be conceded. But it is plain to be seen that the determination of such a question, in a private controversy solely upon such facts as the parties to the controversy may have seen fit to bring before the court, when the court made no pretense of going *beyond* the facts thus presented, *and would not do it under its fixed rule of decision*, cannot, and should not, bind this court, when the rights of other parties are involved.

It is submitted that such a rule cannot with any propriety be applied to the plaintiff, in the case at bar.

Hence we say that our adversaries erroneously assume that the decisions in *Ryan vs. Lynch* and *Miller vs. Goodwin* positively determine, not only as to the parties to those suits, but as to all persons whomsoever, that the act of 1857 under which the bonds in question were issued, "is not a law of the State *to-day*;" whereas, under the rules of evidence applied by the Supreme Court of Illinois, notwithstanding it has been determined in those two cases that this statute is no law, *that Court*, and every other judicial tribunal in the State *to-day*, would have to treat the act of 1857 as *prima facie* a law, upon the production of the published statute; and unless proper proof were introduced through the record impeaching the validity of the law, such courts would be required to take judicial notice of it as a valid law in force *to-day*, in all controversies with respect to alleged rights growing out of it. And under the rule of evidence which the Supreme Court of Illinois has seen fit to apply to determine the existence of a public statute, *when its existence is controverted*, if a suit

were brought in the State court of Illinois *to-day* upon one of the bonds issued under this law, and no issue was raised as to the existence of the law, and no other defense shown, the Court would be required to render judgment for the plaintiff. And if the case were appealed to the Supreme Court of the State, that Court would refuse to "explore the Journals," or look at the transcript of the Senate Journal (or the original journals for that matter) at the suggestion of counsel, in order to determine whether the act was constitutionally passed, and the judgment would *unquestionably* have to be affirmed, notwithstanding the decisions of the Supreme Court of Illinois in *Ryan vs. Lynch* and *Miller vs. Goodwin*. So, under the rule adopted in Illinois, we necessarily have the spectacle presented, of the Supreme Court adjudicating in one case that an alleged statute was a valid law, and in another case that it was no law. And such a state of things in fact exists to a certain extent with reference to this identical, disputed act, for, in point of fact, decisions of the Court of Illinois show that in cases involving the rights and liabilities of the parties growing out of this law it has been declared to be a law duly passed. Thus in *Dunnovan vs. Green*, 57 Ill. 65, the Supreme Court of Illinois in 1870 sustained the levy of a tax to pay interest on bonds issued in pursuance of this act of 1857, and say, "we have been referred to no law which repeals the act of 1857. *It being in force*, we must look to its requirements," etc.; and again in 1871 in *Force vs. Batavia*, 61 Ill. 100, rights of parties arising under it were adjudicated upon it as a law in force, in a direct proceeding.

If this court shall deem itself bound by the decisions of the

Supreme court of Illinois, as construed and insisted upon by our adversaries, it would of course have to adopt those decisions to their full extent, and if a case should come to this court for review, wherein judgment had been rendered upon a series of bonds issued under a void law, and in which the existence of the law *had not been controverted* in the court below, but the reversal of the judgment was sought upon other grounds, in following the decisions of the Supreme court of Illinois, it would, unless there were other sufficient reasons for its reversal, have to affirm the judgment, and thus judicially recognize the validity of the law; whereas in another case, arising under the same supposed law, if the evidence was competent and sufficient, the judgment might have to be reversed. So, notwithstanding the Supreme court of Illinois, in the case of *The People v. De Wolf*, held that the law of 1871, extending the jurisdiction of justices of the peace, was not constitutionally passed, yet if the explorations of the crypts of the office of the Secretary of State, by some other litigant whose asserted rights under that supposed law had been denied by DeWolf (acting in his judicial capacity), led to the conclusion that that law did constitutionally pass, and he should be able to satisfy the court by "the legitimate proof" that such was the fact, he might subject DeWolf to damages for the refusing to take cognizance of his rights under a public statute of the State, although the existence of the statute was, upon one occasion, so obscured that the Supreme court of the State could not discover it with its judicial eye. So also, some person who had been deprived of his liberty or divested of his property by means of some process issued by the LaSalle county court, under its assumed extended juris-

diction, might mulct the officer executing the writ, or party at whose instance it was issued, in heavy damages, if he could make the "legitimate proof" that the law extending the jurisdiction of the court was not constitutionally passed, and in either case the defendant would appeal in vain to the courts of Illinois for protection, because in *Grob v. Cushman*, *Bedard v. Hall*, and *The People, etc. v. De Wolf*, the Supreme court of the State had assumed that the supposed laws in question were valid ones, and had estopped the parties who sought to question the existence of the statute in the first two cases from questioning it, and held the supposed statute void in the latter case. He would be met by the language of the court in the latter case, viz.: "We pass upon the *validity* of "the act in question *no* further '*than as affects the present* "*application in view of the admitted facts in the case.*'"

In *Spangler v. Jacoby* the writ was quashed, because the agreed case showed that the law changing the term for holding the court was not constitutionally passed; but, if Smith, instead of Jacoby, had sued Spangler, and no agreed case had been made, and no proof offered as to the manner in which the bill fixing the time of holding the court was passed, Spangler would have been estopped from questioning the validity of the law, his motion to quash the writ overruled, and the jurisdiction of the court over him maintained; and, if he had further prosecuted the case by appeal to the Supreme court of the State, the judgment in the case against him would have been affirmed, for it was *only* decided in the case of *Spangler v. Jacoby* that the law for holding the court at the time at which the writ was returnable was void "in view of the admitted "facts in the case." And so the court might, upon the doc-

trine announced in *Ill. Cent. R. R. Co. v. Wren*, *Grob v. Cushman*, *People v. De Wolf*, *and Bedard v. Hall*, assume jurisdiction in one case, and refuse to entertain jurisdiction in another, governing itself by the sufficiency of the proof as to the validity of the law, when any was offered, and applying the doctrine of estoppel, against questioning the validity of the law, when *no* proof was offered as to the manner in which the act passed the legislature.

In *Ryan v. Lynch* the only evidence before the court, with respect to this act of 1857, was what purported to be a duly authenticated transcript of the journals. No question was raised as to their authenticity, and such a thing as the loss of the original was not even suggested. The case was decided solely upon the authority of *Spangler v. Jacoby*, and as bearing upon the question now involved, it has no additional weight.

As an adjudication binding upon the bond holders, it is entitled to no consideration, as is very clearly shown by the brief of Messrs. Hay and Littler. As said by Mr. Perry it seems to have been altogether a purely "family affair," to which it is sufficient to say "*Res inter alios acta alteri* "*nocere non debet.*"

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## THE MILLER-GOODWIN CASE.

It is said, as appears from the printed abstract before the Supreme court of Illinois in that case, that it was a decree by *agreement*, what is known in chancery practice as a consent decree, as is inferred, by which it was "ordered, etc.. *pro*

*forma.*" As it is said your Honors have a printed copy of the record, in that case the attention of the court is respectfully asked to the decree.

It is said by counsel (Mr. Phillips) that this case was argued by the writer of this brief. This is a mistake. The writer had nothing to do with the case from first to last.

The Miller-Goodwin case has been already very elaborately discussed by other counsel, and it is unnecessary to repeat what has been so ably said by Messrs. Perry, Hay and Littler.

It is simply remarked in addition thereto, that this court in that case rendered its decision based upon the facts appearing in *that record.*

It did not assume to do more. Its decision, therefore, is not binding upon this court for the reasons already stated. That court would not regard that case as *res judicata* upon the question as to the existence of the statute in another case and between other parties. It will be observed that the court in the introductory portion of the opinion, say:

"In *Ryan v. Lynch*, 68 Ill. 160, we held, *on the evidence* "*then before us*, that the purported act was not passed in con- "formity with section 2 of article 3 of the constitution. The "*evidence* upon which we came to that conclusion was a tran- "script of the senate journal. The same evidence is before us "now, but there is evidence introduced for the purpose of im- "peaching this transcript; then our first enquiry must be *as to* "*the effect of that evidence.*"

If your Honors examine the record in that case it will be

seen that it nowhere appears, as is shown in the findings in the case at bar, that there existed two distinct things, viz.: (1.) That the "*current minutes*" were taken by the officers of the Senate in an abbreviated form, as the proceedings progressed; and (2) that *from them* a full and complete journal was written out by *the officers of the Senate. But it appeared to that court* that these current minutes taken as the proceedings occurred, and necessarily in an abbreviated form and in a very incomplete state, as is always the case, were of too loose a character to be considered a record, but simply were "notations" on blanks prepared for conveniently taking the ayes and noes, on cap paper, which were fastened together at the end of each day's proceedings and subsequently deposited with the Secretary of State, which the Secretary caused to be copied in regular order in a bound volume prepared and kept in his office for that purpose, called "the journal record." Again on page 662 The court says: "It is obviously impracticable to record the proceedings of each house as they transpire, in "well bound volumes," as must have been well known to the members; yet the journals must be thus *kept*, and it is certainly impossible that the journals should be copied in a well bound book unless there is something to copy from. *Plainly then the current minutes, taken by the clerks* were not understood to be "journal records," but *minutes merely*, as *they were in fact, to be transcribed into such records.*"

It is apparent that the court arrived at the conclusion of fact from "the evidence then before it." That the current minutes were altogether of too fragile and imperfect a character to constitute a journal record, as no doubt they were,

hence the court conceived a necessity for a record of some sort, and evidently arrived at the conclusion, erroneous in point of fact, that these brief "current minutes" were reduced to form and substance by and under the direction of the Secretary of State, and made much of the matter of "leather and binding."

It is clearly apparent that the court never learned, as a matter of fact, that these "current minutes" were formally written out by the Secretary of the Senate and his assistants, and a complete journal made therefrom, which was, and which alone, in the nature of things, could be the journal of the Senate.

If it had clearly appeared to the court in the Miller-Goodwin case that the "current minutes" were formally written out by the officers of the Senate, and a complete Journal thus made by those whose duty it was to make up the Journal, and that the *original Journal, so made up, was lost*, it is altogether improbable that the court would have found that the act was not constitutionally passed, but would doubtless have sustained the presumptions arising from the enrolled bill.

(1) The Constitution, as we have seen, required each House to keep a journal of its proceedings.

(2) The law required the original journals to be deposited in the office of the Secretary of State, but nowhere requires it to be copied into books *by the Secretary of State.* He was simply required to furnish the "well-bound book" as he was required to furnish other stationery for the printing of the laws, etc.

(3) The law of 1836, then in force, required that the Journal and other proceedings shall be copied for the public printer by the Secretary of the Senate and Clerk of the House. The *Secretary* of *State* was charged with no duty in respect of the Journals of the Legislature, except to furnish a well-bound book, and contract with some person to copy the Journals into it. He was not authorized to make a Journal for the Legislature. This could not be constitutionally done, and there is not even color of law for it. A close examination of the statutes by the court is earnestly solicited. (See brief of Mr. Perry, pp. 4–5.)

(4) There can be but *one journal, and that, by the Constitution, was required to be kept by the officers of the General Assembly*, and the Legislature could not, by any law, authorize the Secretary of State to make a journal for it. Has the Legislature ever assumed to do so absurd a thing?

(5) The provision requiring the journals to be kept in well-bound books was designed to afford an efficient means for their preservation, and did not, and could not, authorize the Secretary of State to write up a journal for the Legislature in a well-bound book, or in any other manner; and, if the journal was kept, but *not* in well-bound books, such disregard of this directory provision of the statute could not impair the validity of the journal as the only *authentic record of the proceedings of the General Assembly, made in pursuance of an express provision of the Constitution.*

(6) The journal is, what its name imports, the daily record of the proceedings of the General Assembly, and by the rules of the General Assembly is required to be read each

day, upon the opening of the session, and how could this be done if the Legislature had to wait until the *Secretary of State* should make a journal for it in a well-bound book? There is but one record of the proceedings of this court. Would it not be absurd indeed for Congress to provide that some officer, other than the clerk of this court, should make a record of its proceedings after its adjournment?

Section 1 of article 1 of the Constitution of Illinois, of 1848, provides each House shall keep a journal of its proceedings, and publish the same.

Chapter 84, section 3, R. S. of 1845, provides: "The journal of each House of the General Assembly shall hereafter be kept in well-bound books. The Secretary of the Senate and Clerk of the House of Representatives shall, within ten days after the adjournment of each session of the General Assembly, deposit the original journals kept by them as aforesaid with the Secretary of State." This is a continuation of the act of January 16, 1836.

This act recognizes the *original journals* kept by the General Assembly *as the journals* and nothing else, and the Legislature is powerless to create a journal through the instrumentality of anyone other than the officers of the General Assembly.

It is said in the supplementary opinion, in *South Ottawa vs. Perkins:* "We hold the existence of the law to be a judicial question, to be decided by the court. It follows that the court below, on re-trying the case, must itself be satisfied whether the law in question was or was not constitutionally passed. The evidence, or means of ascertain-

ing this fact, must be such as is legally applicable to such a case according to the laws of Illinois." Now what do the laws of Illinois permit to be shown, to impeach the validity of a duly authenticated and promulgated statute, in order to overthrow the presumption arising therefrom that the bill passed? They permit a resort to be had to the *original journals* of the General Assembly, if they are in existence, for the purpose of showing affirmatively by them that the law did not receive the requisite majority. They permit the Secretary of State to make and certify a transcript of the *original journals* of the General Assembly, and if the presumption arising from the enrolled bill that the act was constitutionally passed, can be thus overthrown by the original journals, it can be done.

Under the opinions rendered in the Perkins case it was the duty of this court to judge of the weight and application of the evidence allowed by the laws of Illinois, for it is said, "But the mode of ascertaining and using that evidence must rest in the sound discretion of the court on which the duty in any particular case is imposed."

That the original journals kept by the officers of the Legislature are not now, and were not, when the Secretary issued his certificate, in existence, and that the certificate of the Secretary of State was not based upon them, as is found by the Circuit Court, is an indisputable fact.

This is the very question that the Supreme court said must be determined by the Circuit court "on which the duty devolves in any particular case."

Now, the inquiry is pertinent, when and where have the Supreme court of Illinois ever held, when it appeared to that

court that the *original journals* were lost, that this presumption as to the constitutional passage of the law could be overthrown by a resort to any kind of secondary proof? No such case can be cited.

In *Spangler vs. Jacoby*, 14 Ill. 300, it is said: "If the journal is lost or destroyed, this presumption *will sustain the law, for it will be intended that the proper entry was made on the journal.*"

So, as to the attacks made upon the validity of this law, it is again replied, that it must be presumed valid from its authoritative authentication and promulgation; and, second, the original journals being lost or destroyed, as is clearly shown, its validity *cannot be impeached by any character of secondary evidence*, and, conceding that the question of the existence of the law is a question of proof, it was a question of fact for the Circuit court to determine—and neither that court, nor this court, if it should deem it proper to review the findings in this respect (but which it is not believed it will do), can be restricted in the determination of it, by the finding and judgment of the State court, in another case, made under the rules of decision in Illinois, conceding that it involves the same questions of law and fact. And more especially is this so when it appears, as is clearly shown, that *Miller vs. Goodwin* was decided upon a record which did not present a full, clear and complete statement of all the facts properly bearing on the case. Nor would the Supreme court of Illinois, as is shown, "under the laws of Illinois," deem itself bound by its decision in that case, upon another and more satisfactory consideration of the same case.

The simple question then is, did the bill pass as required by the constitution? The Supreme Court of Illinois say that, at the outset, the presumption is that it did, and why? Simply for the reason that from the promulgation of the law they will presume that the requirements of the constitution in the passage of the bill were fully complied with; that is to say, they will not require the production of the journals nor take judicial notice of their contents, but sustain the law upon the *presumption* arising from its authoritative promulgation that the bill passed upon a vote by ayes and noes, and that they were entered in the journal, and if the journal is lost or destroyed, they say, (and, I may add, it necessarily follows) that the bill must be sustained and cannot be assailed by any secondary evidence as to the contents of the journal, because the *enrolled law* in that case, from the necessity, must be deemed to import absolute verity, and so the Supreme Court of Illinois say, and for these reasons, the bill, thus authenticated by the signature of the President of the Senate, Speaker of the House, and the Governor—all acting under the solemnities of their oaths, in the performance of their official constitutional duties—must be paramount to any secondary evidence upon the question; for to permit the existence of laws to be attacked collaterally under such circumstances would leave the rights of the people of the State (and the citizens of all the States, who have an equal right under the Federal Constitution to know what the statute law of this State is) at the mercy of any mischievous and designing persons. And this very case is a forcible illustration of the absolute soundness and justice of that rule.

It is a monstrous proposition to assert that the public

must accept the law subject to the continual hazard of its being overthrown by some proof of a secondary character, as to the contents of the lost journals, which shall destroy the presumption of verity arising from the enrolled law in the office of the Secretary of State, duly signed, as required by the constitution.

As authority, therefore, neither *Ryan vs. Lynch* nor *Miller vs. Goodwin* have any binding effect upon the plaintiff. The bondholders were not parties to either of these cases, not even by publication, and this court in *Empire vs. Darlington*, 101 U. S. 92, said: "It is scarcely necessary to say that the decree in the court of McLean County, Illinois, enjoining the collection of taxes for the purpose of paying the bond and coupons in question and declaring the bonds to be void, did not conclude the rights of the defendants in error. The bond holders were proceeded against by constructive notice—it was ineffectual as to bondholders residing in other States who were proceeded against by constructive notice. *Brooklyn vs. Ins. Co.*, 99 U. S. 362."

And again in *Livingston Co. vs. Darlington*, 101 U. S. 413, this Court in a similar case said: "None of the holders of the bonds were made parties. No attempt was made to bring them before the Court in any form; it is *not therefore binding upon them as a final adjudication of the questions now before us*," citing in addition to the case above noted *Pennoyer vs. Neff*, 95 U. S. 714, and *Brooklyn vs. Ins. Co.*, 99 U. S. 362.

The weight, if any, which the Ryan-Lynch and Miller-Goodwin cases ever had as authorities binding upon the bond-

holders, has since been annihilated by the Supreme Court of Illinois in the following recent cases: In *Town of Virden vs. Needles*, 98 Ill. 366, the Circuit Court had, at the suit of the tax payers, enjoined the payment by the County Treasurer of the bonds, but it dismissed the bill as to the "unknown bond holders" (who were made parties as such) on the ground that it had no jurisdiction as to them. This was assigned for error.

The court say, p. 369: "The bondholders were not personally before the court, and no personal decree could, therefore, be rendered against them. The court did not have the bonds and coupons under its control, so it was impossible to make any decree enforcing their cancellation," citing *Cooley* on *Const. Lim.*, 1st ed. 404, and *Harris vs. Pullman*, 84 Ill. 20, where the opinion was delivered by the same judge who delivered the opinion in the case then under consideration, and also in *Ryan vs. Lynch* and *Miller vs. Goodwin*, viz.: Justice Scholfield. The Harris-Pullman case *supra* contains a very clear statement of the law, citing with approval the decision of this court in *Boswell vs. Otis*, 9 How. 348. See also *Hall vs. Finch*, No. 79 of this term of this court.

In view of the rule of decision in Illinois upon the question of the existence or non-existence of a public statute, as a question of fact, so far as relates to the passage of the bill through the Legislature, as shown by the journals, we submit that it is quite apparent, that under the recent decisions of the Supreme Court of that State, in a case where the bondholders were parties and their rights the subject of adjudication, that

court would consider and adjudge with respect to them, in all respects, as if *Miller vs. Goodwin* had never been before it.

In this case we have the legal presumption that the act in question passed in conformity to the constitution, from the following facts:

(1) The act appears among the published laws of the State, duly certified.

(2) It also appears, from the documentary evidence introduced to impeach the acts, that it duly passed the House, and its passage was officially reported by the House to the Senate on the 14th of February, 1857; that on the 16th of February it was read a first and second time in the Senate, and referred to the committee on corporations. (6th finding, Rec. p. 12).

(3) It was officially reported by the Senate to the House on the 17th of February, *that the Senate had concurred with the House in the passage of the bill*, and on the same day the bill was reported by the proper committee as *correctly enrolled*, as shown by the same alleged copy of the House journal (7th finding, Rec. 12–13).

(4) The bill was thereupen duly signed by the Speaker of the House and President of the Senate, and duly laid before the Governor for his approval, and on the 18th of February a message was received from the Governor informing the House that he had signed the bill, as is shown by the same alleged transcript of the journal, wherupon the bill was filed in the office of the Secretary of State "as a valid statute of "the *State of Illinois, and so remains there on file*," in con-

formity to section 21 of Article IV of the constitution of Illinois of 1848.

(5) There is no legitimate evidence in existence to overthrow this presumption.

It must be conceded that the findings relied on to impeach the act all tend to sustain the *presumption* that it was constitutionally passed—a presumption upon which the plaintiff has the right to rely, as is shown by all the Illinois cases cited—but which it is claimed by the plaintiff is rendered conclusive from the loss of the original journal, and the existence of the enrolled bill.

Now, it is said the entry of the ayes and noes on the journal is necessary to the validity of the act, and that, not appearing from the alleged copy of the journal, the act must fall; and it is further said that this is necessary, because the constitution requires a majority of *all the members elect* of both houses of the legislature to pass a bill But there is no force in this suggestion.

Whether the constitution required a majority of those voting, or a majority of all the members elected, could make no possible difference in this regard; the entry of the ayes and noes could be of no more importance in the one case than the other. *The constitution does not say that an act shall be void unless the ayes and noes are entered on the Journal.*

In this connection the attention of the court is called to the case of *Barr v. Auburn*, 89 Ill. 362. The question involved in that case was the validity of an ordinance. The village was incorporated under the general law, R. S. Ill., of

1874, pp. 215–216, which of course was its organic act, and upon which solely the validity of its municipal proceedings rested. It is as much a limitation upon the corporate power of the trustees of the municipality as the constitution is upon the legislative powers of the general assembly.

It provides that "the yeas and nays *shall* be taken upon the passage *of all ordinances*, which shall be entered on the journal of its proceedings, and the concurrence of a majority of all the members elected to the City Council *shall be necessary to the passage of any such ordinance or proposition.*" Here, there was a most explicit *limitation* upon the corporate power of the city with respect to the exercise of legislative powers, so to speak.

The *journal* simply showed, "on motion of William Brownell the following ordinance (reciting it) was *unanimously* adopted."

Section 46 of this act provides that "all ordinances shall, before they take effect, be deposited in the office of the City Clerk; and if the Mayor approves thereof he shall sign the same;" and confers a veto power similar in substance to the provisions of the constitution. Upon the authority of *Spangler v. Jacoby*, it was insisted that the *journal not showing the entry of the yeas and nays*, the ordinance was void; but the court said it was *admitted* "that the board of trustees of the village was composed of six members." The journal showed that only one member was absent from the board at which the ordinance was "*unanimously adopted.*" Hence the court *infer* that the ordinance was passed with the concurrence of a

*majority* of the members-elect of the body passing the same. The court say:

"This, we think is the esssential thing, and we are inclined to hold that the showing of the journal is sufficient in this regard, and hence that *the journal does not rebut the prima facie proof* made of the legal passage of the ordinance *by the introduction in evidence of the book of ordinances containing the same.*" In this opinion all the judges concurred except Mr. Justice Dickey, who dissented. (See p. 373.)

The significance of this case is, (1) that it is an explicit disavowal by the court of the intimations contained in some of the former opinions that the entry of the ayes and noes on the journal is absolutely essential to the validity of a law, and (2) that the *presumption* as to the constitutional passage of an act arising from its enrollment and official promulgation cannot be overcome unless it is made *affirmatively to appear by the journal that it was not* passed by a constitutional majority. It seems apparent from this opinion that only when the journal shows affirmatively that a vote was taken by ayes and noes, and less than a majority present voted "aye," when only such a majority was required, or that when, or in case a majority of all the members elect was so required, that less than a majority thereof, *as shown by the entry in the journal*, voted "aye," then the presumption as to the constitutional passage of the bill resulting from its enrollment and attestation by the signatures of the Governor and presiding officers of the General Assembly, would not be considered by the court as overcome.

It seems equally apparent from the last cited case that

the court, from the gravest considerations of public policy, was constrained to say that it was only *when the journal absolutely rebutted* the legal presumption as to the passage of the ordinance, in conformity to the organic act, that it would hold the ordinance invalid.

Less than this, in a state which tolerates any departure from the general rule that an enrolled bill imports absolute verity, could not be held with a due regard to the rights of the citizens of the State, who are bound to accept an enrolled law, officially promulgated, as "*prima facie valid.*"

Certainly, it cannot be argued that the official communication from the senate to the house importing that the bill had constitutionally passed, and by the house to the governor, which appears from what is said to be a copy of the journal, together with the enrolled law attested by the signatures of the presiding officers of both houses, and finally by the signature of the governor (in pursuance of an express provision of the constitution)—all under the sanction of official duty as sworn public officers—are less weighty to establish a presumption of the due passage of a bill, than is the entry of a village clerk that the ordinance was "*unanimously* passed," to establish its passage by the necessary majority vote required by the organic law.

In *People v. Loewenthal*, 93 Ills. 205, the bill was objected to for the reason that while it originated in the senate and passed that body, it appeared to have been amended in the house, and that the senate never concurred in the amendment, as the senate journal was *silent* as to any vote by ayes and noes upon the bill "as amended."

Some days after the passage of the bill in the senate, it was by that body sent to the house, asking its concurrence. In the house the bill was read twice, and reported back "with amendment," recommending its passage; and it was then passed by the house, and the clerk of the house reported to the senate that the house had concurred with the senate in the passage of the bill "amended as per amendments "attached thereto." The senate journal showed no amendments of the bill in that body, and no vote upon the bill after it was reported to them by the house as having passed "amended as per amendments attached thereto," but the court, impressed with the great danger of overthrowing a law officially authenticated and promulgated, indulged in the inference that the senate sent the bill to the house with "amend-"ments attached," a very remarkable thing to do under the recognized parliamentary rules governing legislative bodies. Yet to sustain the bill (the bill having been before a joint committee of both houses on enrolled bills, who reported its enrollment to the house, and also to the senate), the court say: "That the bill has been laid before the governor for his "approval," and concludes as follows: "The *burden is upon* "*the party* assailing the validity of the act to show its in-"validity *and make out a clear case.*"

*It is not enough to raise a doubt.* We think we may say that upon the showing here, it is not convincingly proved that the amendments were made to it by the House." (p. 208.)

It thus appears by the most recently expressed conclusions of the Supreme court of Illinois, that in no case will an act of the Legislature, duly enrolled and authenticated as re-

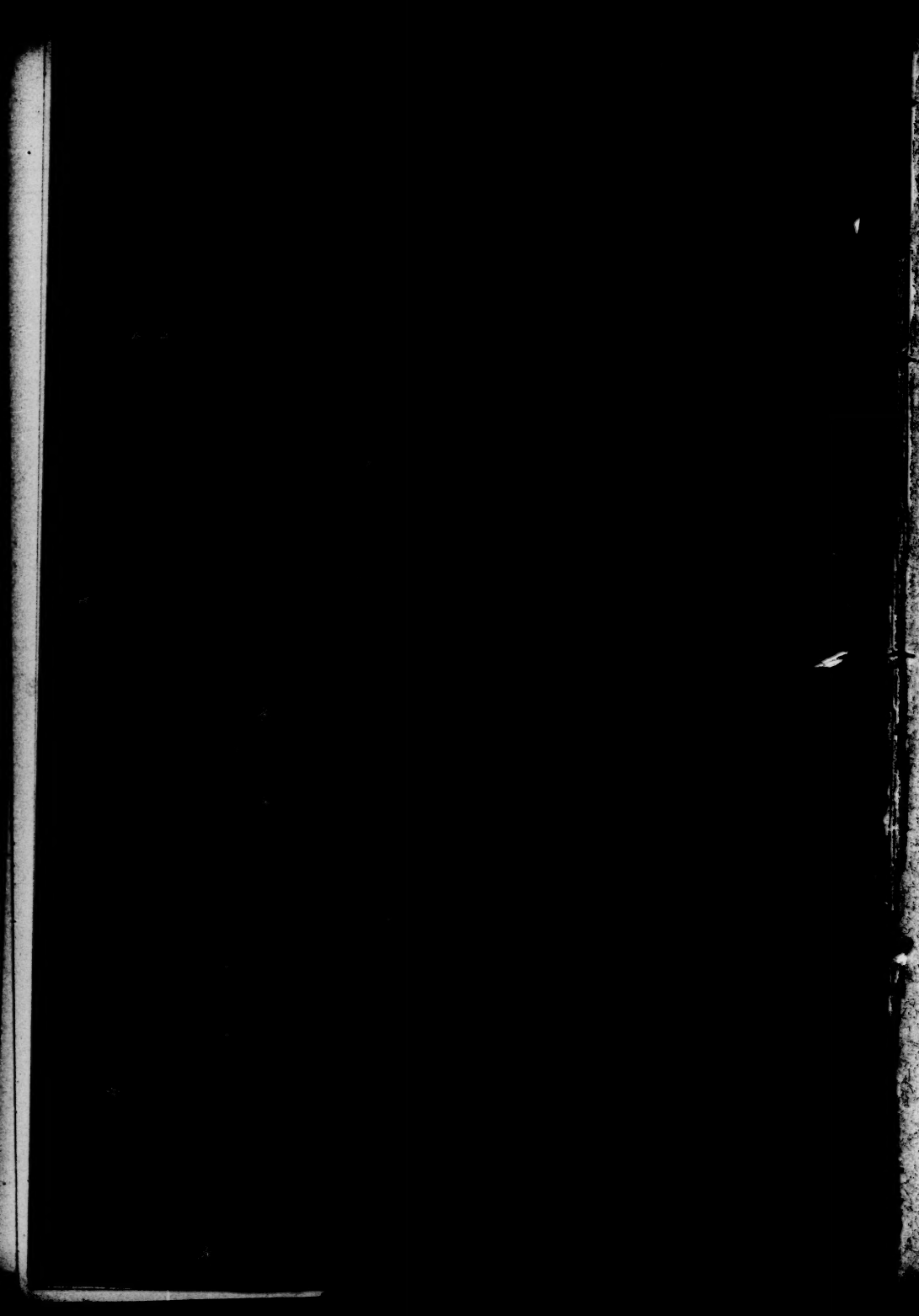
quired by the constitution, be held to have been unconstitutionally passed, unless it is shown affirmatively by the assailant of the law, by the most irrefragable proof *from the journals*, that the bill did *not* pass in conformity to the requirements of the constitution.

It is confidently submitted that whether considered under the rules generally applicable in determining the question as to the existence of an act of the Legislature, or under the rule of decision peculiar to Illinois, the validity of the law of February 18, 1857, under which the bonds in question were issued, cannot be successfully assailed.

The other questions involved have been sufficiently discussed by other counsel.

Respectfully submitted,

G. S. ELDREDGE.



IN THE

# SUPREME COURT,

## UNITED STATES

AUGUSTUS T. POST
*vs.*
KENDAL COUNTY. } No. 249.

AMOSKEAG NATIONAL BANK
*vs.*
TOWN OF OTTOWA. } No. 235.

## BRIEF OF

P. PHILLIPS,

*for Defendant in Error.*

WASHINGTON, D. C.:
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*vs.*
KENDAL COUNTY.
No. 249.

## Brief of P. Phillips for Defendants in Error.

In 1873 Post brought his action on certain bonds issued by the County on the 4th May, 1869, under the act of the legislature of Illinois, approved 18th February, 1857.

On the trial the court sustained a demurrer to the plea, denying that the act of 1857 had been passed in pursuance of the 13th section, 3d article, of the Constitution of the State.

The court also, on the plea of the general issue, rejected the evidence offered by the defendant to establish the same defence, and rendered judgment on verdict for plaintiff.

The county thereupon sued out a writ of error, and the cause was heard and determined at the October Term, 1876, when the judgment of the Circuit Court was reversed, and the case remanded.

94 U. S., 260.

Another trial has been had before the Circuit Court without the intervention of a jury, and judgment has been rendered for the county defendant.

On the finding of facts the judges were opposed in opinion on the two questions—

1st. As to whether the act of 18th February, 1857, was, or ever became a valid statute of Illinois.

2d. As to whether the plaintiff, upon said facts, was entitled by law to recover in said action.

The said facts and said division are certified to this court for determination.

The presiding justice being of opinion that, upon the facts, the law of the case on both questions is for the defendant county, judgment was entered accordingly, 30th July, 1879.

The case is again here by writ of error at the instance of Post.

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This case has been twice most elaborately argued here, and twice maturely considered by the court.

It is therefore unnecessary to discuss any matters which have already been adjudicated; and to avoid doing this we proceed to state the result of the decision, as reported in 94 U. S.

After citing the constitutional requirements, "that each House shall keep a journal of its proceedings and publish them; that on the final passage of all bills the vote shall be by ayes and noes; that no bill shall become a law without the concurrence of a majority of all the members-elect in each House," the Court holds—

*First.* That by a long series of decisions by the State Court, it is held to be necessary to the validity of a statute that it should appear by the legislative journals that it was passed as required by the constitution.

*Second.* That in the two cases of *Ryan* vs. *Lynch*, and *Miller* vs. *Goodwin*, decided by the Supreme Court of the State in 1873 and 1875, it was held that the bill of 1857 never became a law, and the pretended act conferred no power. That the bonds were not merely voidable, but were absolutely void for want of power or authority to issue them.

*Third.* That these decisions are obligatory on the court, otherwise we should have the strange spectacle of two different tribunals having co-ordinate jurisdiction in the same State, differing as to the validity and existence of a statute of the State without any power to arbitrate between them. As a matter of propriety and right the decision of the State court on the question as to what are the laws of the State is binding upon those of the United States.

*Fourth.* These decisions should have governed the action of the Circuit Court. It was not necessary to have raised the issue, except by demurrer to the declaration. The court is bound to know the law without the advice of a jury. It was the duty of the court to take judicial notice of the journal entries to ascertain whether the law had been constitutionally passed; whatever may be the practice in the courts of the State, the question as to the existence of a law is a judicial one, and must be so regarded by the courts of the United States.

*Fifth.* Not only courts but individuals are bound to know the law, and cannot be received to plead ignorance of it. The holder of the bonds in question can claim no indulgence on that score, and can take no advantage from the allegation that he is a *bona fide* purchaser without notice.

*Sixth.* The State may, by its constitution and laws, prescribe what shall be conclusive evidence of the existence or non-existence of a statute; but the question of such exist-

ence or non-existence being a judicial one in its nature, the mode of ascertaining and using that evidence must rest in the sound discretion of the court, on which the duty in any particular case is imposed.

*Seventh.* There can be no estoppel in the way of ascertaining the existence of a law. It would be an intolerable state of things if a document purporting to be an act of the legislature could thus be a law in one case, and for one party, and not a law in another case, and for another party; a law to-day and not a law to-morrow; a law in one place and not a law in another in the same State.

*Eighth.* The subsequent acts, 27 March, 1869, and 28 April, 1869, do not validate the proceedings had under the act of 1857.

After the delivery of the opinion, and during the term, the defendant in error applied for further instructions to the court below. Mr. Justice BRADLEY, in behalf of the court, said: "further instructions were unnecessary. We hold the estoppel set up by the plaintiff below should not be allowed; but that the defendant should be permitted to show the invalidity of the act. We recognize the construction placed by the State Court on the constitution, to the effect that a law is void if not passed by the requisite majority, and so entered on the journal. We hold the existence of the law to be a judicial question to be decided by the court. In retrying the case it must be satisfied whether the law in question was, or was not, constitutionally passed, and the vote entered on the journals. The evidence, or means of ascertaining this, must be such as is legally applicable to such a case, according to the laws of Illinois."

The sole question left open by this decision is whether the act of 1857 was passed in accordance with constitutional requirement.

The law applicable to the enquiry is as follows:

The constitution of 1848, in its 3d Section, requires not only that each House shall *keep* a journal of its proceedings, but also that it shall *publish* them.

The 21st Section directs that on the final passage of all bills the vote shall be on ayes and noes, and shall be *entered on the journal.*

The importance of this direction is seen in the subsequent provision that "no bill shall become a law without the concurrence of a *majority of all the members elect in each House.*"

The provision to *keep* and *publish* the journal is also found in the constitution of 1818.

These constitutional provisions are enforced by the following Acts:

*The Act of 16 January, 1836,*

1st section, provides that "the Secretary of State shall hereafter superintend the printing of the journals.

"2d. The journals of each House shall hereafter be kept in *well-bound* books. The Secretary of the Senate and Clerk of the House shall furnish the public printer a copy of the journal kept by them, and shall, within ten days after the adjournment, deposit the *original journal* kept by them *as aforesaid* with the Secretary of State."

Acts of 1836, p. 236.

*The Act 3 March, 1845,*

1st section, provides that the Secretary of State shall be the keeper of the great seal.

5th section makes it his duty to furnish, when required,

copies of all laws or other records appertaining to his office, to which he shall attach his certificate under the seal of the State.

The 7th section charges him with the safe keeping of all laws, records, &c., deposited, or hereafter to be deposited, in his department.

The 8th requires the Secretary of the Senate and Clerk of the House, at the close of each session, to deliver to the Secretary all bills, books, documents, and papers, and the Secretary is required to file the same.

Revised Statutes, 1845, p. 491.

The constitution of 1848 was adopted in August of that year, and was soon followed by the—

*Act* 12 *February*, 1849.

The 3d section directs the Secretary of State to advertise for proposals for copying the laws and journals—the price of the work to be limited to 20 cents for each 100 words.

The 4th section requires the Secretary to furnish a well-bound book in which the journals shall be copied; and in case the person contracting to do the copying shall fail to comply, the Secretary is to cause the same to be done by some competent person.

The 5th section also requires the Secretary to advertise for proposals for distributing the laws and journals among the several counties.

Acts 1849, p. 95.

*Act* 9 *March*, 1869.

Copies of all bonds, papers, writings, and documents legally deposited in the office of the Secretary of State, when certified by the Secretary and authenticated by the seal of

his office, shall be received in the same manner and with like effect as the originals.

1 Gross Stats., ed. of 1869, p. 681.

*Act* 20 *March*, 1869.

This copying of the * * journals shall be done under the personal supervision of the Secretary of State, and such copies shall be carefully compared with the originals before being printed. Do., p. 417.

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The defendant below, under the sanction of these laws, offered in evidence the certified transcript from the "well-bound books" certified by the Secretary and authenticated by the seal of the State.

Also the journal as printed by the public printer under his supervision. These were objected to by the plaintiff as incompetent, on the grounds set forth in his bill of exceptions.

The court overruled the objections, deciding to leave their effect, the principles of law to be deduced therefrom, and how far they are to control, as open questions to be determined on the whole evidence.

## The Finding of Facts.

We call attention only to those findings which are deemed material to the ~~only~~ question to be determined in this cause. One

The *5th* states that according to usage, the Secretary of the Senate, with assistants, kept minutes each day, and, at its close, made up from these the journal of that day on paper prepared for that purpose, fastening the sheets at the top. This was the complete journal for that day, which it

was his duty to deposit within ten days after adjournment with the Secretary of State, whose duty it was to have them copied in "well-bound books" under the provisions of Secs. 3 and 4 of the act 12 February, 1849.

In pursuance of these provisions the Secretary did provide the "well-bound books," and caused the journals to be copied therein, and these books still remain in his office.

In this connection it is further found that the journals for 1857 were copied into the "well-bound books" by Roberts, the principal Enrolment Clerk of the Senate, and Higbe, his employé.

These persons were not charged by law with this duty—Collard was the contractor for this purpose.

Roberts and Higbe applied to the Secretary of State for permission to do this work. He replied he did not care who did it as he held Collard's securities responsible, and if they did not object he would not. The sureties having assented, the journals were, by the direction of the Secretary, handed to Roberts and Higbe to be copied into the "well-bound books."

The *9th* states that a part of the original journals, for the session of 1857, were sent to the public printer before their delivery to the Secretary of State, and a greater part to Roberts and Higbe by direction of the Secretary, before or after they had been copied in the "well-bound books." When taken to the printer they were separated, and the sheets distributed to the compositers. When printed they were then copied into said books. After this no care was taken to preserve them and they are lost. Until 1872 they were never preserved after they were copied.

At the time of final adjournment, 19 February, 1857, the proceedings of the *16th*, *17th*, *18th*, *19th* had not been written out in full. But this was done by the proper officers

within ten days, and transcribed into the books before being sent to the printers.

The *12th* shows that in the office of the Secretary of State is a series of books published as journals of the two Houses from 1822 to 1874, the journal of 1857 being one of them.

Prior to the constitution of 1848, and the act 12 February, 1849, the books were made up by the Secretary of the Senate and Clerk of the House as the original journals, or were made by copyists appointed by the Houses, and then deposited with the Secretary of State as original journals.

The series of books since made are the work of copyists, as heretofore stated.

The entire series, by the usage of the respective Secretaries of State, have always been treated as the official record; and as far as the evidence shows, no other copies of such journals were ever preserved as official documents.

These are the findings which affect the question, whether the certificate of the Secretary of State, transcribed from the well-bound books, was admissible in evidence, and sufficient when taken in connection with the other facts found to sustain the judgment.

Passing from the certificate of the Secretary, we now ask attention to the journal as published by the public printer.

*The 10th finding* shows that soon after the close of the session of 1857, the journals of both Houses were published by the Secretary of State. The printing of the journals of that session was done under his official supervision. He caused the printed journals to be compared with the original cap-paper journals. This was his habit when he could conveniently do so. When he could not it became the duty of his assistant. He could not remember whether

that part of the journal relating to the act in question was compared by him or his assistant.

It is then found that these printed journals show precisely the same proceedings on the passage of the act as are exhibited in the "well-bound books," and none other.

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The court is now asked by plaintiff in error to decide that the presiding justice on these findings had no warrant for his conclusion, that the act of 18 February, 1857, "was not and never became a valid statute of Illinois;" and that the plaintiff was "not entitled to recover in said action."

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In maintaining the propriety of the judgment, the plaintiff's exceptions to the admissibility of the evidence introduced by defendant, are necessarily to be considered.

These exceptions are—

*First.* As to the *Secretary's certificate.*

That he was not the custodian of the original journals for that year.

That it was not transcribed from any original journal.

Or from any certified or compared copy; or from any book or paper which itself, if present, would be evidence.

That an enrolled bill cannot be impeached by such evidence.

That the defendant is estopped, as against an innocent holder of the bonds, from proving that the act recited in them was not passed, as required by the Constitution.

*Second. As to the printed journal.*

That such evidence is not authorized by any act, and because the Supreme Court of the State has decided that it was not evidence of the contents of the original.

## Argument.

We have thus seen that provision was made for the permanent preservation of the journals as early as 16 January, 1836. This was too important a matter to be left to the cap-paper proceedings fastened at the top, and so the act provided that these journals should thereafter be kept in "well-bound books." These books, under this act, were made up directly by the Secretary of the Senate and the Clerk of the House; and these *books* are, by the terms of the act, designated as *original journals.*

This continued until the adoption of the constitution of 1848, and the passage of the act of 12 February, 1849, when the Secretary was directed to advertise for proposals for *copying the journals into* "well-bound books" to be provided by him for this purpose.

From the date of this act to 1873, when this litigation was initiated, the journals on cap-paper have been deposited in the office of the Secretary of State, whose duty—as stated in the fifth finding—was to have them copied into the "well-bound books.

By the act 29 April, 1873, the mode of preservation provided by the act of 1836 was reinstated. The 8th section is as follows:

"The original journals which may be prepared by the Secretary of the Senate and Clerk of the House of Representatives *shall be securely bound in books* and filed in the office of the Secretary of State."

Acts of 1873, p. 70.

While the Legislature has thus persistently provided for the preservation of the journals in a permanent form, it has made no provision for the preservation of the cap-paper journals after they had been transcribed in the "well-bound

books." And so it is found that though there is a series of books in the State Department published as journals, extending from 1822 to the present time, which by usage have always been treated as the official record, no other evidence of the journals has ever been preserved as official documents.

We again call attention to the fact shown by the findings that the journals relative to the act of 1857 were copied into the books before being sent to the public printer.

It is true that the copying was done by Roberts, the enrolling clerk of the Senate, and not by Collard, who had contracted to do the copying designated in the act at a given rate per 100 words.

We submit that this does not at all weaken the presumption that the copying was faithfully and accurately done.

It was not the intention of the act that the copying should be done with his own hands. He gave bond to secure the performance of this duty; and when the Secretary, by his consent, authorized Roberts to perform the work, the object of the act was fully complied with.

It is also to be remembered that this copying was done some twelve years before the bonds were issued.

There was, then, no motive for making a false transcript; every presumption is in favor of a correct copy, and there is not a fact found to shake the conclusion of its truthfulness.

In further support of the verity of the book, we have a very pregnant fact—

The 1st Section of the act of 16 January, 1836, as already stated, made it the duty of the Secretary of State "to superintend the printing of the journals."

These journals were to be distributed among the several counties as authentic information of the action of the Legislature.

The finding states that the printing of the journals of 1857 was done under the official supervision of the Secretary, who caused the printed journals to be compared with the original cap-paper journals.

These printed journals, thus prepared for distribution, are exact copies of the journals as they appear in the well-bound books in the office of the Secretary, and completely establish their verity if proof *aliunde* was required to support them.

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We come now to consider the question as to the admissibility of the evidence offered by defendant.

In regard to journals of the Legislature, they constitute an exception to the general rule which requires the production of the best evidence, and may be proved by examined copies. This exception is allowed because of their nature as original public documents which are not removable at the call of individuals; and because being interesting to many persons, they might be necessary as evidence in different places at the same time.

Moreover, these being public records, they would be recognized as such by the court upon being produced, without collateral evidence of their identity or genuineness. These journals may also be proved by the copies printed by the Government printer by authority of the House.

1 Greenleaf Ev., § 482.

But the above rule is not confined to journals of the Legislature. The contents of any record of a judicial court,

and of entries in any *public books or registers*, may be proved by an *examined copy*. This extends to all records and entries of a public nature, *in books required by law to be kept*.

Do., § 91.

The journals of fhe House of Lords, as also of the House of Commons, are admissible in evidence. In this country, in all public matters, the journals of Congress and of the State Legislatures are evidence, and also the reports which have been sanctioned and published by authority. This publication does not make evidence, which intrinsically is not so; but it gives in a most authentic form certain papers and documents. The original report duly authenticated by the Treasury Department would be evidence, and it is evidence in the published volumes. The very highest authenticity attached to State papers published under sanction of Congress.

*Watkins* vs. *Holman*, 16 Pet., 56.

But we need not rely upon any further authority for these principles, as the well-settled adjudications of the Supreme Court of the State have finally determined that, by the construction of the constitution and the statutes of the State, the evidence offered in this case is not only competent but conclusive.

As early as 1853, the Court, in *Spangler* vs. *Jacobs* (14 Ill., 298), after citing the constitutional requirements, say:

"When an act has gone through all the forms of legislation, it is deposited in the office of the Secretary of State. *The journals of the two Houses take the same direction. They all become records of his office, and may be certified as such under the seal of State.*"

"The Constitution," say the Court, "requires each House to keep a journal, and declares that certain facts made essential to the passage of a law shall be stated there-

+Evanston v Gunn 99 U.S. 666

in. If these facts are not set forth, the conclusion is they did not transpire. The journal is the evidence of the action of the House, and by it the act must stand or fall."

The court was not then called upon particularly to define what constituted the journal, or how far the "well-bound" books were evidence of it.

But in the two cases of *Ryan* vs. *Lynch* and *Miller* vs. *Goodwin*, which directly involved the constitutionality of the Act of 1857, the invalidity of the act was declared on evidence certified from the well-bound books by the Secretary of State.

In the latter case, reported in 70 Ill., 660, referring to the former (68 Ill., 160), the Court say:

"The evidence upon which we came to that conclusion was a transcript of the Senate journal, certified by the Secretary of State in proper form. The same evidence is before us in the present case; but there is also evidence introduced by appellants for the purpose of impeaching this transcript, and our first enquiry must be as to the effect of that evidence."

The court then, after stating the mode of proceeding in reference to the journal and citing the provisions of the constitution and the several statutes herein referred to, hold "that the requirement that any evidence of such journal shall be *kept in the office of Secretary of State, as well as when and how evidence of the same*, admissible in courts of justice, shall be obtained, is merely a *statutory regulation*."

It is then added—

The transcript in evidence "was of the *proper record*, and is *conclusive* against the validity of the pretended act of 18 February, 1857." In this judgment all the judges concurred.

Our proposition is that these decisions of the Supreme Court of the State as to what are the journals, and how they may be certified so as to constitute evidence, are obligatory upon the federal judiciary.

It is asserted, on the contrary, that these decisions are not obligatory, because made on bills to enjoin the collection of taxes in which no bond holder was a party.

In *Elmwood* vs. *Marcy*, we have a case in all particulars like the one before us, to wit, two decisions of the Supreme Court of Illinois made subsequent to the issue of the bonds.

The statement in the opinion of the court is—

"The questions arising upon the record were elaborately considered in *Marshal* vs. *Silliman*, 61 Ill., 218; and the doctrines therein announced were recognized and enforced in *Weley* vs. *Silliman*, 62 Ill., 170. The last case involved the validity of the identical bonds in question, both were in all substantial particulars alike. They were bills in equity to enjoin the collection of taxes for the payment of interest, and the court decided that the act of 9 March, gave no authority to issue the bonds."

In concluding the opinion the court say:

"We are not called upon to vindicate the decisions of the Supreme Court of Illinois, or approve the reasoning by which it reached its conclusions. If the questions before us had never been passed upon by it, some of the judges who agree to this opinion might like a different view of them.

"But are not these decisions binding on us in the present controversy? They adjudge the bonds are void, because the law authorising their issue was in violation of a peculiar provision of the constitution of Illinois.

"We have always followed the highest court of the State in its construction of its own constitution and laws * * *

If a different rule were observed, it is not difficult to see that great mischief would ensue."

92 U. S., 289.

Another objection to the binding force of the State decisions is that they merely decide a rule of evidence. Were we to admit this *argumenti gratia* the proposition is not sustainable.

In *McNeil* vs. *Holbrook*, it was decided that a statute of the State prescribing a rule of evidence in reference to bills and promissory notes was included in the word "laws." The court saying that it would be difficult to make the laws of the State, in relation to the rights of property, the rule of decision in the Circuit Courts without associating with them the laws of the same State, prescribing the rules of evidence by which the rights of property must be decided. The object of the law of Congress was to make the rules of decision in the courts of the United States the same with those of the States, taking care to preserve the rights of the United States, by the exceptions contained in the same section. Justice to the citizens of the several States required this to be done.

12 Pet., 89.

In *Hinde* vs. *Vattier* the question was as to the *admissibility in evidence* of certain books to prove title. The doctrine in the preceding case is again asserted, the Court saying: "The rules of property and of *evidence*, whether derived from the laws or *adjudications* of the judicial tribunals of a State, furnish the guides and rules of decision in those of the Union in all cases to which they apply."

5 Pet., 401.

In *Polk's Lessee* vs. *Wendell*, we have another case in which this court held they were bound to follow the decision of the State Court on a *rule of evidence.*

But the decisions of the State court do more than estab-

lish a rule of evidence. They determine *what are the journals* as referred to in the constitution and acts of the State.

The Circuit Court was directed to inquire "whether the act was constitutionally passed and the vote entered on the journal."

The Supreme Court of the State having decided what constituted the journals, the Circuit Court was bound thereby.

On the trial below, after the certificate of the Secretary of State had been read in evidence, the defendant objected to the introduction of evidence by plaintiff in opposition thereto, upon the ground that such certificate was conclusive. His objection appears by his bill of exceptions; and though he cannot assign error, as the judgment is in his favor, it is proper to say that the plaintiff in error has no ground of complaint, as the ruling of the court below in his favor allowed him a defense not permissible by the law of the Supreme Court of the State.

As the court follows the decisions of State courts, without feeling called on to vindicate the reasoning upon which they are based, much less is it necessary for counsel who rely upon their obligatory effect to do so.

In saying this we are not to be understood as meaning that these decisions stand on questionable ground.

On the contrary, we believe that they are impregnable in their conclusions, and we may be permitted to illustrate this by the attempt of the learned counsel who argued the case here to assail them.

The Supreme Court, in *Miller* vs. *Goodwin*, in arriving at their conclusion that the well-bound books constituted the journal, say:

"Of necessity the minutes could not be in a convenient and permanent form of preservation, and they were, therefore, required to be copied into a record in which they could be preserved. This view is greatly strengthened by the fact that there is no other possible motive which we can conceive for requiring the journals to be copied in a bound record."

"Public information of the proceedings is required to be furnished by publication, *and if this record is not designed to be a permanent depository* of the evidence of the proceedings required to be copied therein, then we must presume that the law requires the *making and preservation of a public record with no end in view.* This is not admissible."

It was all important to the plaintiff, that this decision should be successfully answered, for if it stood the test of argument there was an end of the controversy.

The attempt to overthrow it is thus stated—Say the counsel:

"Taking the whole statute together there is not a line or word which in terms makes the 'well-bound books' evidence in the *first instance.* In fact the statute is entirely silent on the question as to whether these books shall be evidence, *under any circumstances, for any purpose whatever.*

"In discussing this statute we do not feel called upon to show this court just *what the law making power intended in its passage* * * *

"It may be the Legislature only intended to give the Secretary an opportunity of *making an honest dollar in copying the journals;* but our impression is it was the intention to *put the journals in better shape for preservation,* and with the view of resorting to the "well-bound books *in case of loss of the original.*"

Brief of Hay, Green & Litter, p. 18. on former.

We need make no comment on the first suggestion, as to the motive of the Legislature; the second is of a more substantial nature.

There is, however, this singular contradiction arising out of the intrinsic difficulty of their case—that while the counsel, in the argument here, stated as their impression that the intention of the act was to "put the journals in better shape for preservation, with a view to resort to the 'well-bound books' in case of the loss of the original," in the court below, they asserted, by way of replication to defendant's plea, the "loss of the original," and on this ground claimed "THE ACT BECAME A LAW."

This is the new feature that now distinguishes the case. In *Ryan* vs. *Lynch* and *Miller vs. Goodwin*, the Court, *without proof of the loss of the original journals*, held that the certified transcript by the Secretary of State from the books "was of the proper record," and was "conclusive against the validity of the act."

The grounds of their decision, we submit, have increased —not lessened—force, when applied to a case in which these original journals were proved to be lost.

As it is found that these cap journals were never preserved, after they were copied into the books, until 1872, it follows, from the position assumed by plaintiff in error, that no act of the Legislature can now be challenged successfully for want of compliance with constitutional requirements.

We refer, also, to an argument by another of the eminent counsel for Post, made on the application for rehearing.

"It is believed (says he) that no State has the power under the federal constitution to provide by its organic laws as to how the acts of its legislature shall be authenticated, and then by judicial construction determine that such authentication shall merely create a *presumption* that the law was duly passed, which may be overcome by a resort to the legislative journals, if they *omit to show* that all the

forms of legislation provided for were observed on its passage."

Brief of Mr. Elridge, p. 9.

As the decisions of the State Court holding that the constitutionality of an act might be tested by a resort to the journals, had been made many times and for many years before the rights of the bond holders attached under the act, the keenest vision will search in vain for any conflict between the power of the State Court to determine such a question, and any power or prohibition in the federal constitution.

We have, as we suppose, sufficiently answered the plaintiff's exceptions. As to those rested upon the propositions that an enrolled bill cannot be impeached by such evidence —and that the defendant is estopped from proving that the act was not constitutionally passed—these have already been answered by the decision rendered in this case.

The case being here on writ of error, and certificate of division under Section 650, R. S. the court, if it find the judgment to be correct, need do no more than to affirm it.

*U. S.* vs. *Reese*, 92 U. S., 215.

In concluding, we refer to a decision of the court at the last term, delivered by Mr. Justice WOODS, in which it is held that the "question, whether a statute is really a law or not is a judicial one, and is to be settled and determined by the Court and judges; and is not a question of fact to be determined by a jury."

*Town of Walnut* vs. *Wade*, ~~No. 250~~. 103 US 683

This case involved the validity of a statute of Illinois, and the evidence offered *pro* and *con* was the certified transcript of the Secretary of State—in all respects like the certificate used in this case.

On these considerations with much confidence we insist that the court did not err in the admission of the evidence as stated in the Record, and that the judgment of the presiding justice should be affirmed.

P. PHILLIPS,
*For Defendant in Error.*

## Brief in Reply.

The plaintiffs in error, failing to support the validity of the bonds, under the act of 1857, insist they can be sustained under the act 27th March, 1869, notwithstanding what has been decided in *South Ottawa* vs. *Perkins*, 94 U. S., p. 70., because "it did not appear by the record in that case that either South Ottawa, or Kendal County, were 'near to' said road, or that the road was located through the territory of said corporations; and for this reason only, as we understand the decision, the act mentioned could not be quoted as authority for the issue."

(Brief Hay & Littler, p. 70.)

This does not correctly state the scope of the decision. The court say—

"It is urged that the reference to the act of 1857 is such a recognition of that act as to give it validity, if it had none before. This was certainly not the purpose of the act of 1869, nor do we think such was its effect. The Legislature could not thus, in 1869, give validity to a void act, as an act passed in 1857, which was not constitutionally passed in that year, for that would be an evasion of the Constitution. It could, at most, give it vitality as a new act from the date of the act of 1869. *But this it does not profess to do*, it only adopts its provisions for the *purposes of the act thus passed*; and if the Legislature of 1869 could have validated all proceedings had under the supposed act of 1857, *it did not do so*. No such purpose is indicated in it."

Again:

"No *intent* to validate and establish the act of 1857, as a law, can be gathered from the terms of the act of 27th March, 1869. To give such a reference in a subsequent act as is here relied on, the effect of validating or reviving, or vitalizing a void or repealed statute, when no such *intention is expressed*, would be dangerous, and would lay the founda-

tion for evil practices. The Legislature might, in this way, be entrapped into the enactment or re-enactment of laws when it had no intention or even suspicion that it was doing so."

The same observations are then applied by the court to the act of 20th April, 1869, the court saying—

"It does not profess or purport to give any force or validity to the act of 1857, or to validate any proceedings had under that act. It takes for granted—mistakenly, as we have seen—that the act was duly passed, and does nothing more.

"The last-mentioned act (27th March, '69), could not, in any event, by any prospective effect, aid the holders of the bonds in suit; *for the elections called to authorize their issue were held before this act was passed*, as appears by the recitals in the bonds themselves. Indeed, the election authorizing the Ottawa bonds was held in 1866, long before the passage of either of the acts referred to; and, in the absence of any expression in the laws themselves evincing such intention, it can hardly be claimed that these laws gave any retroactive validity *to elections, which were without authority and void* when they were held."

In the two cases now before the court, the bonds of the town of Ottawa were issued by virtue of an election held on 3d December, 1867, fifteen months before the passage of the act.

The bonds of the County of Kendal recite that the election was held on the 30th March, 1869, three days after the passage of the act. Of course the application of the tax-payers for the election, as well as the order for the election, must have been long prior to the act. In both cases it is recited that the elections were held under the act of 1857.

The act of 1869 authorizes subscriptions upon "the terms and conditions" prescribed by the act of 1857, and the latter act provides that the election shall be, on the application of fifty voters, called by the clerk, and conducted in the

same manner as other elections. The law existing at that time required that at least *twenty days' notice* should be given prior to the election.

It is thus evident that the election held in Kendal County could not have been held under the act of 1869. What, therefore, was said by the court in reference to the Ottawa election is equally applicable to the election in Kendal County.

## The Act 6th March, 1867.

At p. 72 of the same brief it is insisted, that the bonds must be held good in the case of the Town of Ottowa (this town being a portion of the territory of La Salle) under the act of 6th March, 1867.

And as to the bonds in the Kendal County case, they are to be held valid under the general railroad law of 1849.

As to this general law of 1849, it is sufficient to say that the argument now made was fully urged at the former hearing without receiving the sanction of the court.

The act of 1867, to which counsel calls the special attention of the court, has never heretofore been relied on in this protracted litigation.

Counsel say, "The attention of the court below was not called to this act, nor did we know of its existence until very recently. They insist that the preliminary proceedings required to be taken by it are 'substantially the same as those required by the alleged void act.'"

Let it be borne in mind that the contention is that though the act of 1857 may be held to be null and void, and so defeat a recovery on the bonds of Kendal County, and of all the other counties and corporations indicated in said act, yet as to the *bonds of Ottowa*, they can be sustained in virtue of the powers conferred upon La Salle (of which Ottowa forms a part) by the said act.

The Ottawa bonds recite that the election was held under the act of 1857, on the 3d December, 1867, "the said act having special reference to the said Ottawa, Oswego, and Fox River Railroad Company," previous application in writing of *fifty* legal voters of said town for such election, having been made to the clerk of said town, due *notice* having been given of the time and place of holding the same as required by *law and the act aforesaid.*"

It is thus made manifest that the town, in all that it did, acted under the authority supposed to be conferred by the Act of 1857, and that the recital of this Act was not a *mere error.*

The order for the election was made prior to the passage of the Act in question; the election was subsequent thereto. The question is whether, though it may be certain that, the town acted wholly under the act of 1857, and in ignorance of the act of 1867, the provisions of the latter act may, nevertheless, be appealed to to sustain the bonds.

We are thus led to the consideration of the two acts by which we find they differ in many of their provisions.

First, as to their *general scope.* The Act of 1857, only conferred power on contiguous counties, &c., to subscribe to *three named railroads.* That of 1867 conferred power on three counties specially named, Woodford, La Salle and Livingston, but subscription was not limited to any particular road, but might be made to any *road incorporated, or thereafter incorporated by the State.*

In their *special provisions* there are also many differences between the two acts.

In the 1st the amount of subscription is *unlimited.* In the 2d it is limited to $100,000.

In the 1st the subscription is to be made on the application of *50 voters*; in the 2d on the application of *20 voters.*

In the 1st at least *30 days' notice* of the election is required; in the 2d, *20 days.*

In the first act, power is conferred on the proper authorities of any city, &c., to make arrangements for payment, and to levy such taxes as may be necessary therefor "as other taxes are levied by them."

In the second, special power is conferred on the county clerk in extending the tax, and the duties of the county treasurer is specially provided for.

We make this statement and submit it without argument, for the question is, whether the legislature intended, by this act of 1867, in any wise to refer to, or to act upon, the power conferred by the act of 1857, so far as La Salle is concerned.

If it be asked why was La Salle county already authorized to subscribe by the act of 1857, included as one of the three counties named in the act of 1867? The answer is very palpable.

As already stated, under the first act, its power to subscribe was limited to the *three named railroads*, in the latter act it was authorized to subscribe to *any road then in existence, or which might thereafter be incorporated.*

We thus have, so far as La Salle is concerned, a special law and a general law; and by well recognized principles of construction, the latter will not be held to affect the former, without a clear indication of legislative intent.

How will the learned counsel, in applying the act of 1867 to the bonds of La Salle county, surmount the difficulty presented in the cases of those corporations within that county, whose *elections were held prior to the passage of the act of 1867?*

When the case of *South Ottawa* vs. *Perkins* was before the court, and it was attempted to sustain the bonds by the act of 27th March, 1869, the court, as already cited, said: "It could not in any event, by any prospective effect, aid the holders of the bonds in suit; for the elections called

to authorize their issue were held before this act was passed, as appears by the recitals in the bonds themselves. Indeed, the election authorizing the Ottawa bonds was held in 1866, long before the passage of either acts referred to; and in the absence of any expression in the laws themselves evincing any such intention, it can hardly be claimed that these laws give any retroactive validity to *elections which were without authority and void when they were held.*"

Now what is said as to the act of 1869 is equally applicable to the act of 1867, so far as South Ottawa is concerned, as well as to all the other corporations in the County of La Salle, whose elections were held prior to the act of 1867.

And if the act of 1867 could be applied to the bonds of the town of Ottawa, now before the court, we should have the singular case of an act, *general in its terms*, by construction made applicable to one portion of a county, and held inoperative as to other portions of same county.

Again, neither in its title nor in its provisions is there any reference made in the act of 1867 to the act of 1857.

Its title is "An act to authorize the counties of Woodford, La Salle, and Livingston, and the townships, cities, incorporated towns, and corporations *in said counties*, to subscribe to the capital stock of any railroad that now is, or hereafter may be incorporated in the State of Illinois."

When the Legislature in subsequent legislation designed to refer to the act of 1857, it did so in express terms.

Thus, the act of 20th April, 1869, is entitled, "An act to amend to an act, entitled "An act authorizing certain cities, counties, towns, and townships to subscribe to the stock of certain railroads in force February 18, 1857."

By this amendment *parts* of certain towns in the county of La Salle were authorized to subscribe.

So, in the act of 20th April, 1869, amending the charter of the Ottawa, Oswego & Fox-River Valley Railroad Company, to which the bonds in question were issued, express reference is made to the act of 18th February, 1857.

This amendment permitted a change of route, and in doing so it provided that any city, county, &c., near to or through which the road may be located, was authorized to subscribe upon the conditions prescribed by the act of 1857.

The counsel, in support of the proposition that the bonds may be held valid under the act of 1867, refers to the case of *Commissioners* vs. *January*, 94 U. S., 202, in which the bond recited that it was issued under the act of 25th February, 1868.

Before any election was had, or subscription made or bonds issued, the act of 1868 was repealed by the act of 1869. All that was done was in conformity to the requirements of the latter act, and the recital of the repealed act, under the peculiar circumstances of the case, was held by the court to be *mere error*.

This is very different to the question now raised, where all the proceedings are in exact conformity to the act of 1857, recited in the bond. There is here no error or mistake in the recital of this act, whose continued existence is still the subject of judicial investigation.

Seeing that the case must finally rest on the validity of the act of 1857, the learned counsel deny that the cases of *Ryan* vs. *Lynch* and *Miller* vs. *Goodwin* are authoritative expositions of that act, for the reason, *first*, that the proceedings in which the judgments were had were against the tax-collector, and the bondholders were not a party thereto.

We add, to what has already been said in the foregoing brief, that, in the case of *Miller* vs. *Goodwin*, though the answer is made by the tax-collector, it will be seen by inspection of the record it was evidently prepared in the in-

terests of the bondholders, and by counsel employed by them.

There is no matter now urged that is not to be found in the answer. On the question as to the validity of the act, as to the mode of keeping the journals, and as to what constituted the original journals, a large number of witnesses were examined by defendant.

Our conclusion that the bondholder's interest was fully represented in the litigation is not only warranted by the fullness and completeness of the answer and proofs, but by the additional fact, that, in the answer of the tax-collector, he refers to the details of the issue of the bonds ($60,000) "as fully set forth in the *affidavit of W. H. Miller, hereunto attached, and marked schedule C, which this respondent asks may be taken as part of his answer.*"

This affidavit shows that the bonds were delivered to the railroad company; by it put upon the market and sold in good faith for full value without notice of any defect or irregularity.

Miller was also examined as a witness. He testified that the bonds were sold by the railroad to the contractors in payment of the construction of the road. They sold them to his *firm of Mix & Miller*, who disposed of them to various parties.

On cross-examination *Miller admitted he was then the holder of coupons for one year's interest.*

Not only this, on the granting of the injunction Miller executed the appeal bond by which the case was carried to the Supreme Court of the State.

There the case was argued by Mr. Eldridge, the same gentleman who appeared here at a prior term for the bondholders.

The argument so earnestly urged in both briefs for plaintiff in error was before this court in *Ottowa* vs. *Perkins*. It is only necessary to say it was not acquiesced in.

Again it is said, that the case as made in *Miller* vs. *Goodwin* is essentially different from the case now presented.

It is asserted there was "no evidence there, as the findings here show, that the journal thus witten out was the full and complete journal of the Senate. The evidence there was of inchoate minutes only. The evidence here is of a complete journal, made by the officers of the Senate," therefore, it is manifest, that the facts of this case were never in judgment in the cases referred to. p. 42.

As much weight seems to be attached to this objection we have caused to be printed for use of the court the full record in the case referred to, and it will require more than the conceded ability of counsel to point out to the court any essential difference between the facts of that case and the one now before us.

As to both of these objections, we say they have been disposed of by the decision in *Ottawa* vs. *Perkins*, in which it is determined that the judgments in *Ryan* vs. *Lynch* and *Miller* vs. *Goodwin*, in the construction given to the constitution and laws of the State, constitutes a rule of decision for the Federal tribunals.

In referring to these two cases the court holds: "It would be an intolerable state of things if a document purporting to be an act of the legislature could be a law in one case, and for another party, a law to day and not a law to-morrow; a law in one place and not a law in another, in the same State. And whether it be a law, or not a law, is a judicial question, to be settled and determined by the courts and judges.

It would be a very unseemly state of things, after the courts of Illinois have determined that a pretended statute of that State is not such, having never been constitutionally passed, for the courts of the United States, with the same evidence before them, to hold otherwise."

Again:

"When once it became the settled construction of the Constitution of Illinois, that no act can be deemed a valid law, unless by the journals of the Legislature, it appears to have been regularly passed by both houses, it became the duty of the Courts to take judicial notice of the journal entries in that regard. The courts of Illinois may decline to take that trouble, unless parties bring the matter to their attention; but on general principles, the question as to the existence of a law, is a judicial one, and must be so regarded by the Courts of the United States."

We have not deemed it proper, either in this or in our first brief, to discuss generally the questions of law, which, as we understand, were decided in *Ottawa* vs *Perkins*. The case was twice heard by the court, and most maturely considered by it. We therefore assume that what was then passed upon will be adhered to.

There is nothing new in the briefs for plaintiff in error but the introduction of the act of 1867. Our chief object in this reply is to answer the argument asserting its authority to sustain the validity of the bonds issued by the town of Ottawa.

Respectfully submitted,

P. PHILLIPS,
*For Defendant in Error.*

15 February, 1882.

FILED
APR 15 1957

# Supreme Court, United States.

SUPERVISORS OF KENDALL COUNTY
*vs.*
POST. } No. 249.

AMOSKEAG NATIONAL BANK
*vs.*
TOWN OF OTTAWA. } No. 235.

## ADDITIONAL BRIEF

AS TO

## THE OBLIGATORY EFFECT OF STATE DECISIONS

ON THE FEDERAL JUDICIARY.

In *Supervisors of Kendall* vs. *Post*, it was held in reference to the decisions by the State court, in *Ryan* vs. *Lynch* and *Miller* vs. *Goodwin*, that these "should have been sufficient to *have governed the court below.*"

94 U. S., 268.

These State decisions were *subsequent* to the issue of the bonds, and were made on bills of injunction filed against the tax collector and treasurer alone.

The case of *Elmwood* vs. *Marcy*, in this court, presents precisely the same conditions, to wit: two decisions by the State court *subsequent* to the issue of

the bonds, on bills of injunction to which the *bondholders were not parties.* This was also an Illinois case, involving the constitutionality of an act of legislation.

92 U. S., 294.

In *Township Oakland* vs. *Skinner*, the bonds were issued in 1870 under the act of 1861. A decision of the State court, not yet reported when the case was argued here, was relied on as showing that the act did not authorise the issue of the bonds.

The court say:

"We have not been furnished with a copy of this decision, but it is referred to in the briefs of both parties. While its effect or conclusiveness is a subject of difference, the decision itself is not denied."

"If the Supreme Court of a State gives construction to the language of a statute, and there have been no conflicting decisions, this court, as a general rule, follows the construction thus given. *Elmwood* vs. *Marcy*, 92 U. S., 289.

It is said that this decision was *ex parte*, given on a made up case. There is no evidence of the truth of these assertions, and we do not well see how evidence of that character could be produced to us."

This decision immediately precedes that in *Kendal* vs. *Post*, *supra*, 94 U. S., 256.

We invite attention to the early case of *Nesmith* vs. *Sheldon*, where the precise question as to the effect of a *subsequent decision* was very ably and elaborately argued at the bar.

The decision relied on was made in 1844, and by

it the act of 1837, to organize banking associations, was held to conflict with the constitution.

TANEY, C. J., in delivering the unanimous opinion of the court, said:

"If we regarded the question as an open one, a more particular statement of the provisions of the act would be necessary.

But it appears that the same question has arisen in the State Court, and has been decided after full argument and consideration. *Green* vs. *Graves*, decided in 1844.

It is the established doctrine of this Court that it will adopt and follow the decisions of the State courts in the construction of their own constitution and laws, when that construction has been settled by the decision of its highest judicial tribunal.

After the decision above-mentioned, therefore, the question certified *cannot be considered as open for argument in this court.* The case of *Groves* vs. *Slaughter*, 15 Pet., and the two cases of *Rowen vs. Runnells*, in relation to the construction of the constitution of Mississippi, stand on very different grounds, as will be seen by a reference to the cases." 7 How., 818.

In *State Railroad Tax case* the question was as to the validity of the act of Illinois imposing the tax. The court, speaking through Mr. Justice MILLER, say:

"If for no other reason, we should reverse the decree of the Circuit Court, because the same questions, involving the same considerations, urged upon us here, have been decided by the Supreme Court of the State in a manner which leads to a reversal here.

As the whole matter, then, concerns the validity of a State law, as affected by the constitution of the

State, that question and the other one, of the true construction of that statute, belong to the class of questions, in regard to which this court holds, with some few exceptions, that the decision of the State courts are to be accepted as the rule of decision for the Federal courts," 92 U. S., 617.

The decisions in the State courts thus referred to were rendered *subsequent* to the levying of the taxes and the judgment of the circuit court was reversed for not conforming to these decisions.

In *Leavenworth* vs. *Barnes*, the bonds were issued in 1865. In passing upon their validity the Court say :

"The *recent decision* upon this identical statute by the Supreme Court of Kansas, in a suit against this county, relieves us from all embarrassment upon this question. It gives effect and construction to one of its own statutes, and, according to well-settled rules, will be followed by this court." 94 U. S., 71.

In *Stone* vs *Wisconsin*, a company was chartered in 1847. The question was whether the charter was subjected to the right of the legislature to modify or repeal it, by virtue of the provisions of the constitution adopted in 1848.

Long subsequent to the organization of the company the Supreme Court of the State decided it was subject to these provisions.

The Chief-Justice, delivering the opinion of the court, said :

"This construction of the statute and constitution

is binding upon us, as a question of State statutory and constitutional law." 94 U. S., 183.

In *Railroad Co.* vs. *Gaines*, on a bill filed against the State officers to enjoin the collection of taxes, a decision of the State court *not yet reported* when the cause was here heard, decided that a clause of an act under which exemption from taxation was claimed was unconstitutional.

This decision was held by the court (the chief-justice delivering the opinion) to be "binding as a construction of a State statute by the highest court of the State." 97 U. S., 709.

*Fairfield* vs. *Gallatin*, presents the question in this form:

At the October Term, 1875, this court, in the case of *Town of Concord* vs. *Portsmouth Savings Bank* (92 U. S., 625), reversed the judgment of the Circuit Court for Illinois, maintaining the validity of the bonds. Mr. Justice STRONG, delivering the opinion, held that, after the adoption of the constitution, 2d July, 1870, donations to railroad companies could not be lawfully made, though authorized by a previous statute and vote of the people.

At the October Term, 1879, in the case now cited, the judgment of the Circuit Court of Illinois was reversed, though it conformed to the previous decision of this court, Mr. Justice STRONG being again the organ of the Court.

The ground for the reversal is thus stated:

"We were fully aware (when the first decision was made) that it is the peculiar province of the Supreme Court of the State to interpret its organic law as well as its statutes, and that it is the duty, as well as the pleasure of this court, to follow its interpretation; but we were not informed when the case was decided that any judicial construction had been given to the constitutional provisions. It now appears that the Supreme Court of Illinois had previously considered it, and decided that donations, equally with subscriptions, if sanctioned by a vote before the adoption of the constitution, are not prohibited by it. This decision was in 1874, a year before the case of the town of Concord came before us; but the decision was not called to our notice, and was not reported until 1877.

In view of this ought the court to adhere to the construction we gave to the constitution in ignorance of the fact that the State court had previously construed it in a different manner?" 100 U. S. p. 50.

A very full citation of cases is then made to support the conclusion that this court should conform its decision to that of the State court, and the case of *Groves* vs. *Slaughter*, which was relied on in argument to induce a contrary conclusion, is closely examined, and held not to sustain the argument.

In this case, it will be remembered, the bonds were executed in 1870, and the decision was made four years subsequent thereto.

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The repeated decisions of this court are to the effect that the construction given by the Supreme Court of the State to one of its statutes, becomes a part of

the statute itself, and is obligatory on the Federal tribunals.

The cases we have now cited are sufficient to show that this obligation is not lessened by the fact that the construction of the statute is made *subsequent to the accrual of the right claimed under it.*

The construction given by the State Court is obligatory on the citizens of the State, when litigating in the State court, and, by *express enactment*, it is made the rule of decision when the controversy exists in the tribunals of the United States. Rev. Stat. § 721.

The exception to the rule is where different constructions have been given to the same statute at different times. In such a case the court is not obliged to follow the latest decision if, thereby, contract rights which have accrued under earlier rulings will be injuriously affected.

"Undoubtedly (say the court, through TANEY, C. J.), this court will always feel itself bound to respect the decisions of the State courts, and *from the time they are made regard them as conclusive in all cases upon the construction of their own laws.* But we ought not to give them a retroactive effect, and allow them to render invalid *contracts* entered into with citizens of other States, which, in the judgment of this court, were lawful at the time they were made." *Rowan* vs. *Runnells*, 5 How., 134;

This is more particularly set forth by the same illustrious magistrate in *Ohio Life Insurance Co.* vs. *Deboit:*

On "the question of the validity of a contract, this court is bound, upon the soundest principles of justice, to adopt the construction it received from the State authorities at the time the contract was made.

It was *upon this ground* that in *Rowan* vs. *Runnells* the court sustained contracts made in good faith, under an *existing construction of the constitution*, although a subsequent and contrary construction, given by the court of the State, would have made such contracts illegal and void." 16 How., 416.

This exception necessarily arises out of the general rule holding the construction of a statute to be a part of the statute itself.

Say the court—

"After a statute has been settled by judicial construction, the construction becomes, so far as contracts rightly acquired under it are concerned, as much a part of the statute as the text itself, and a change of decision is, to all intents and purposes, the same in its effect on contracts as *an amendment* of *the law by means of a legislative enactment.*"

And, so, while admitting the right and duty of the State to change its decisions whenever, in its judgment the necessity arises, the court held in the case then before it that the "rights of the parties are to be determined according to the law, as it was judicially construed to be when the bonds in question were put on the market as commercial paper." *Douglass* vs. *Pike*, 101 U. S., 687.

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There are two cases which seem to be in conflict with the foregoing adjudications.

In *Supervisors* vs. *Schenk*, the opinion being delivered by CLIFFORD, J., it is said:

"Attention is drawn to the fact that in a *recent case*, not yet reported, the Supreme Court of the State have held that the bonds are void, even in the hands of an innocent holder; but inasmuch as the power to issue the bonds was fully conferred by law, the question of their validity in the hands of an innocent holder is a question of commercial law, where the State adjudications, although entitled to great respect, do not furnish the rule of decision in this court."

The only authority referred to is that of *Swift* vs. *Tyson*, 16 Pet.

It is evident that this does not support the case. There it was held that the *decision* of the State court on a general question of commercial law was not binding here. No *construction of a State statute* was in any wise involved.

But, again, this is a mere *obiter*, as shown by the conclusion of the opinion itself, where it is said:

"Prior decisions of the State court were in accordance with the decisions of this court, and as those decisions were supposed to be correct expositions of the law of the State at the period when these bonds were issued, the latter adjudication cannot control the judgment in this case."

This disposed of the case on the well-settled exception to the general ruler.

The other case is that of *Township Pine Grove* vs.

*Talcot*, in which Mr. Justice SWAYNE delivered the opinion; it is said:

"Were we to yield in cases like this to the authority of the decisions of the courts of the respective States, we should abdicate the performance of one of the most important duties with which this tribunal is charged." It then adds:

"The question here under consideration, was fully considered by the Court in *Railroad Company* vs. *County of Ottoe*, 16 Wall., 667; and in *Olcott* vs. *The Supervisors*, 16 Wall., 678. We have no disposition to qualify anything said in those cases. They are conclusive in the case before us."

The Chief Justice did not sit in this case, and MILLER and DAVIS, Justices, dissented.

It is proper to say that this emphatic declaration as to the "conclusiveness" of the cases cited, has no foundation to rest upon.

The case of the *County of Ottoe*, thus referred to came up on a certificate of division. Neither in the arguments nor in the decision of the Court, is there one word indicating that any decision of the State Court was involved, or that the question we are now discussing was even touched upon.

But worse than this. In the other case of *Olcott* vs. *The Supervisors*, in which STRONG, J., delivered the opinion, so far from deciding that the construction of a State statute by the highest tribunal of the State, was not obligatory when the litigation affects commercial securities, decides the reverse.

In that case, County Bonds were in question, and in reference to a decision of the State Court, declaring the act authorizing the Bonds to be unconstitutional, STRONG, J., delivering the opinion, says:

"It is undoubtedly true in general, that this court does follow the decisions of the highest court of the State respecting local questions peculiar to themselves or respecting the construction of their own constitutions and laws."

Referring then to the character of the State decision, he says:

"It is relied on as having given a construction to the constitution of the State. Very plainly, however, such was not its character or effect. The question considered by the court was not one of interpretation or construction. The meaning of no provision of the constitution was considered or declared, etc., etc."

As in nearly all the cases herein cited, in which the court followed the decisions of the State courts in the construction of their constitution or statutes, the validity of county and municipal bonds was in question, the two decisions commented on can no longer be held as authority if they are to be understood as the present appellants understand them.

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In *Groves* vs. *Slaughter*, 16 Pet., Webster and Clay argued for the independent judgment of the court in all cases where the suit was between citizens of different States,

The same argument was repeated by Mr. Carpenter in *Olcot* vs. *The Supervisors*, in 16 Wall.

These arguments are not referred to by the court, in either of the cases, and in the numerous decisions since made they have no wise affected the determination, though in many of them it appears that if the question determined by the State court had been an open one, this court would have reached a different conclusion from that arrived at by the State tribunal.

We have been induced to submit these considerations and authorities, as the appellants in the cases now before us argue the question as one open for discussion.

As we understand the opinion in *Supervisors of Kendal County* vs. *Post*, delivered at October Term, 1876, (94 U. S.), full force and effect were given to the decision in *Ryan* vs. *Lynch* and *Miller* vs. *Goodwin*, decided by the State court.

Mr. Justice BRADLEY, in delivering the opinion of the court, says:

"If, therefore, the *law in question* had never been passed upon by the State court, the courts of the United States would, nevertheless, be bound to give to the *constitution* of Illinois the same construction the State courts give to it, and to hold a pretended act of the legislature void and not a law which the State courts would hold to be so. Otherwise, we should have the strange spectacle of two different tribunals, having co-ordinate jurisdiction in the same State, differing as to the existence of a statute of that State, without any power to arbitrate between them. In

speaking, however, of their jurisdiction, as being co-ordinate, it is only meant that one has no power to enforce its decisions upon the other. As a matter of *propriety and right*, the decision of the State courts on the question as to what are the laws of a State, *is binding upon those of the United States.*

But the law under consideration has been passed upon by the Supreme Court of the United States, and held to be invalid. This ought to have been sufficient to have governed the action of the court below."

*The same case is again before the court*, and whether the matter thus determined is to be regarded as still open for discussion is for the court to say.

It is a question in which we feel no particular interest, as we are satisfied that the decision is sustained by the repeated adjudications to which we have referred.

If it were admitted that these State decisions were not *obligatory*; yet, as the construction given to the statutes conforms to practice of the Executive Department for a period of near a quarter of century, this court will not hesitate to follow them.

"The construction given to a statute, by those charged with the duty of executing it, is always entitled to the most respectful consideration, and ought not to be overruled, without cogent reasons."

*U. S.* vs. *Moore*, 95 U. S., 763;
*U. S.* vs. *Pugh*, 99 U. S., 269.

Respectfully submitted,

P. PHILLIPS,
*For Deft. in Error.*

Manuscript corrections on pages 8.9.27 & 28.

OFFICE SUPREME COURT U.S.
FILED
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JAMES H. McKENNEY, Clerk.

IN THE

# UNITED STATES SUPREME COURT,

OCTOBER TERM, A. D. 1881.

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| AUGUSTUS T. POST,<br>*vs.*<br>THE COUNTY OF KENDALL. | } | Error to the Northern Division of Illinois. |
| AMOSKEAG BANK,<br>*vs.*<br>TOWN OF OTTAWA. | } | Error to the Northern Division of Illinois. |

## Suggestions for Defendants in Error.

By T. LYLE DICKEY.

BEACH, BARNARD & CO., PRINTERS, 104 RANDOLPH ST., CHICAGO.

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## SUGGESTIONS FOR DEFENDANTS IN ERROR.

The *main controversy* in each of these cases—turns upon the validity of *the supposed act of February 18, 1857.*

This controversy is *common* to *both* cases. In both cases also some reliance is placed upon two little supplementary statutes, one of March 27, 1869, amending the charter of this railroad company; and one of April 20, 1869, amending the supposed statute of February 18, 1857. These two little statutes can have no force in the Ottawa case, being passed long after the election, which was in 1867; and these are thoroughly disposed of by this court, in its decision of the case of *Post* v. *Kendall County*, when that case was heretofore before this court. As between the parties to that suit they are *res judicata*, and are not now open for reconsideration. It was there held that neither of these acts aid the supposed act of

February 18, 1857, and that neither of them grant the powers essential to the validity of these bonds. The suggestion made now by Hay & Littler, counsel for Post, that it was not then shown that this railroad passed through Kendall county, has no significance. That fact was assumed, conceded, discussed in the briefs, and judicially noticed at the former hearing. The case is not changed in that respect.

These acts being disposed of, claim of plaintiff for the necessary statutory authority, for the execution of the bonds in the Kendall county case, rest upon two statutes, viz:

The act of Nov. 6, 1849, and

The supposed act of February, 1857.

And the claim for the necessary statutory power in the Ottawa case at bar, is based upon two acts, that is

The act of March 6, 1867, and

The supposed act of February 18, 1857.

As the latter act (February 18, 1857) is the main subject of controversy, I will first dispose of the claim of power in the Post case, under the act of November 6, 1849; and the claim of power in the Ottawa case, under the act of March 6, 1867, before entering upon the main battle-field, in relation to the supposed statute of February 18, 1857.

## I.

### THE ACT OF NOV. 6, 1849, IS PRESENTED IN THE POST CASE.

In the brief of Hay and Littler, counsel for Post, are printed what purports to be "the several statutes involved in these cases relating to the power." Of this act, however, they print only the *first* section. (p. 9 of brief.) That section gives power to counties to subscribe to the stock in railroad companies; but gives no power to issue bonds. The second section (not printed by plaintiff) grants power to *pay* for such subscriptions in bonds of the county; but the fourth section (not printed by plaintiff) declares: "No subscription shall be made or * * * "bonds issued by any county * * * under the pro- "visions of this act * * * *unless* a majority of the "*qualified voters of such county*, * * * (taking as a "standard the number of votes thrown at the last general "election for county officers, previous to the vote had on "the question of subscription under this act) shall vote for "the same." That section further requires such election to be called by the *judge* of the county court; and to be held upon *thirty* days notice.

The recitals in these bonds declare that the election was held "under and by virtue of the act of Feb. 18, 1857;" that "a majority of *the voters participating* at" that election voted for subscription; that the application for the election was made to *the clerk;* that the clerk *called* the election, and that it was held *upon twenty days notice.* This shows no case wherein the power under the act of 1849 could be lawfully exercised. The circuit court finds as facts, that the election was called by the clerk and not

by the judge of the county court or the county board; that it was held on *only* twenty days notice; and that a majority of all the voters participating in the same, voted for subscription, but *not* a majority of all the voters of the county, taking as a standard the number of votes thrown at the last general election for county officers, previous to the vote thus had on the question of subscription.

Thus it is shown affirmatively, that no power ever arose from that election to act under the statute of Nov. 6, 1849. That gives no power to issue bonds, except under certain conditions. The recitals in the bonds and the findings in the record show affirmatively that these essential conditions did not exist.

This claim of power under this act was relied upon in Post's case, when heretofore before this court. If valid, it would have affirmed the judgment which this court then reversed. Although not noticed in the opinion, it was necessarily involved in the decision. It is therefore *res judicata* in this case.

## II.

### THE ACT OF MARCH 6, 1867.

This act can have no application to the Post case at bar, but the attorneys of Post, in their brief, put in a friendly oar for Mr. Perry, (the attorney for the bank in the Ottawa case), and attempt to muster this act into the service for the bank.

This was no doubt done without consultation with Mr. Perry. Had he been consulted, he probably would have called their attention to the limitation in that act confining

the power to vote bonds to the sum of $100,000; and would have advised them of the fact that—before voting the series of bonds (to the amount of $50,000)—of which series the bonds in this suit are a part—this *same town* of Ottawa had *already* voted and issued to this *same railroad company* a prior series of bonds, to the full amount of *$100,000;* so that if such election is to be treated as under the act of 1867, the power granted in that act had been *completely exhausted.* A conclusive reason would thus have appeared to them why brother Perry did not present or attempt to rely upon this act in the hearing before the Circuit court, and a good reason why this act is not referred to in Mr. Perry's brief.

But had this act been presented in the Circuit court—and had not the town of Ottawa already exhausted (if she acted under that statute) all the power granted thereby,—no aid or comfort for these bonds can be found under that statute, for the reason that no vote, such as called for by that statute, was ever taken.

Unfortunately, our friends have printed in their brief only a part of *this statute;* and some of the parts omitted seem to me to be vital to the question raised.

Sections one and five are given. Sections two, three and four are omitted.

Section 1 of this act of 1867 gives power to townships in LaSalle county to become subscribers to the capital stock of *any railroad* organized under the laws of Illinois (no matter where located), and to issue bonds therefor; the proposition to do so having been approved by the railroad company, and the same having been submitted to the legal voters of such township and approved by a majority of the legal voters at an election called by the town clerk,

upon the application of twenty legal voters and *tax payers* of the township, specifying the amount to be subscribed, not exceeding *one hundred thousand dollars* for such town, "which bonds shall in no case bear a higher "rate of interest than ten per cent. per annum, *and said* "*interest* shall be paid out of the treasury *of the county*," provided each township, * * * by its vote, may determine the part of the road on which its stock subscription "shall be expended."

Section 2d requires "the clerk of the township to re- "turn the poll book of the election, together with a cer- "tificate of the result of said election, to the county clerk "within ten days after the election." And if a majority of the legal voters of the township shall have voted for the subscription, the *county clerk* is required "to annually "thereafter cause to be computed and extended on the "taxable property returned by the assessor of that town "a sum sufficient *to pay the interest* on all such amounts "so voted and named in the bonds, which tax shall be "collected as other taxes, and when collected shall be paid "into the *county treasury* as other *county* taxes."

The 3rd section requires the county treasurer to pay out the same, on the presentation *to him* of the bonds so issued by the township, the amount due on each of said bonds *as interest* out of any moneys in his hands for that purpose, and to receive the interest coupons due thereon as vouchers for the same.

Comparing the provisions of this act with those of the supposed statute of Feb. 18, 1857, it will plainly appear that the legal effect of a vote to subscribe $50,000 to this railroad company under the act of 1857 would be very different from the legal effect of a vote by the same town

to subscribe the same amount to the same railroad company under the act of March 6, 1867.

This election was held in compliance with the provisions of the supposed statute of 1857. (See finding, record, 11.) That is, it was called on the application of fifty *voters*, but was not called on the application of *twenty tax-payers*. This is an essential condition to the exercise of the power under the act of March 6, 1867.

The election being held under the supposed act of 1857, the vote for subscription meant that the voters consented to the making of a given contract by the town, and did not give authority to make any other or different contract than that indicated by the act of 1857.

The contract arising from a subscription under the one act is essentially different in substance from the contract arising from a subscription under the other act.

A contract of subscription of $50,000 under the act of 1857 meant, that by so doing the town did not impair its power to make additional subscription to the same railroad company to any extent the town might thereafter choose. A contract of subscription of $50,000 under the act of 1867 meant that, thereby its power to make additional subscriptions to *that* railroad company was thereby reduced and impaired to the extent of the amount subscribed. If this were the first subscription, it meant, that the power to make such subscription was one-half exhausted.

A contract of subscription under the act of 1857 meant —that the railroad corporation might expend the amount of the subscription—in any mode the corporation might choose; might pay interest on its bonds, or expend the

money in any other way, with no power in the town to interfere. A contract for subscription under the act of 1867 meant, that the town might by a vote require the amount so subscribed to be expended upon any particular part of the road the town might designate.

A contract for subscription under the act of 1857 meant that the town reserved *to itself* the power and right "to "make all necessary arrangements, and *provide* for the "prompt payment of all interest." A contract for subscription under the act of 1867 meant that *the town* should *be deprived* of all power in making arrangements or provision for the payment of the interest or for raising the money for that purpose; such contract meant (and its legal effect would have been) to place *all power* on that subject in the hands of the *county clerk*—and meant that he should in each and every year extend, upon the taxable property in the town, a tax sufficient to pay the full amount of the accruing interest, and should so apply it. It might well be, that a town should have funds in its treasury, or other income to meet the whole or a part of the accruing interest, and hence would not need to have a tax levy made every year to the full extent of accruing interest. (Here read margin)

It would be perversion most gross to hold that a vote for a contract of a certain character was equivalent to a vote for another contract, so essentially different as these two contracts would be. It would be a fraud upon the voters of the town so gross that no respectable court could knowingly commit it.

The power granted by this act of 1867 was never exercised; it was never attempted to be exercised. To make valid an act done, the power to do that act must not only

exist, but it must be exercised. Here it was not exercised. No *tax payers* applied for the election. The voters were not asked to vote for or against the contract, which a subscription under that act would produce; and they never did vote for it. They did not vote to make a subscription which would impair or reduce their power as to subsequent subscriptions. They did not vote to reserve the power of locating the expenditure of the subscription. They did not vote to surrender the power to make their own arrangements for paying interest. They did not vote to turn that matter over to the county clerk.

All this had by the act to be approved by a vote before any power to issue bonds could arise under that act. It was not done. They did not vote for a contract requiring the interest to be made payable by the

The resort at this late day to this act of 1867 is a mere subterfuge, and can avail nothing.

## III.

### THE ACT OF FEBRUARY 18, 1857.

The main reliance of plaintiff is on this act.

Defendant contends that act is unconstitutional and void, because the bill for that act was never passed in the senate of Illinois, with the concurrence of a majority of all the members elect; and founds this proposition upon the allegation that there never was any entry upon the journal of the senate, showing this, on a vote by ayes and noes, and so entered upon the journal.

Plaintiff concedes that if it be shown that no such entry was made upon the journal of the senate, the act is unconstitutional and void.

But plaintiff denies that defendant has shown satisfactorily that no such entry was ever made upon the journal.

Defendant assumes the burden of showing this negative proposition. *What are the proofs?*

## I.

## THE PRINTED JOURNAL.

We rely first upon the PRINTED VOLUMES containing the senate journal of that session. It is conceded that if this contains all of the contents of the senate journal of that session, the act never passed the senate, but plaintiff denies that this printed volume is competent evidence. For this denial reliance is placed *solely* upon a remark found in the opinion of the Supreme court of Illinois, in the case of *R. R. Co.* v. *Wren* (43 Ill., 79), where it is said "We are not aware of any law which makes the "printed journal evidence of the contents of the original." An examination of the case shows this to be a mere dictum.

That question did not then come in judgment.

In fact it is there added: "But even if it were, it is not "sufficient to refer us to it. A duly authenticated copy of "so much of the original journal * * * must be "brought before us *in the record;*" meaning the record of the Circuit court. The judgment was placed upon the ground that the record of the Circuit court did not in that case, show the condition of the journal.

Other cases indicate a different view. In *The People* v. *Campbell* (3d Gilman, 466), the Supreme court, in de-

termining whether a given statute had been amended or repealed by a joint resolution, at December term, 1846, refer to the printed journals of the session of 1844–45; that is, to "house journal, p. 611, and senate journal, p. "452," to show what the legislative proceedings in that regard really had been; and taking judicial notice of the journals, found the judgment upon information thus ascertained. Here the evidence of the journals was essential to the judgment.

In *Prescott* v. *Canal Trustees* (19 Ill., 326), that court, in December, 1857, passed upon a supposed statute of 1851; and said: "Such an act is found in the statute "book; but, in reality, there is no such law in existence, "and never has been. Its history is correctly stated in "the agreed case, as we have ascertained by a careful "examination, not only of the *printed journal* but of the "original manuscript journal of the session of 1851."

This remark is not a mere dictum. The court examined and rested its judgment *in part* upon the *printed journal.*

And in *Happel* v. *Brethauen* (decided in 1872), it is said "if the constitution had not been complied with in "its passage, this fact must be shown *either by the* "*printed journal* or the certificate of the Secretary of "State, the custodian of legislative proceedings." This dictum is of as much weight as the remark in *R. R. Co.* v. *Wren, supra.*

The question of competency of the printed journal is certainly not foreclosed against us by any adjudication in Illinois, and, to say the least, is still an open question for determination on the principles of the common law, and

its competency is fully sustained by authority; and not one can be produced to the contrary.

(See Starkie on Evidence, 279–281; *King* v. *Holt*, 2 Leach's Crown Laws, 593; *Common* v. *Longchamp* Norris Peake, 84 N.; *Root* v. *King*, 7 Cowen R., 635; 7 Johnson's R., 38; 1st Greenleaf Evidence—secs. 91–480, and section 482, (referring to 91); *Watkins* v. *Holman*, 16 Peters' R., 56; *Evanston* v. *Gunn*, 99 U. S., 666; and Taylor on Evidence, sec. 1530.)

In Starkie on Evidence, 279, it is said: "Acts of "State may be proved by the production of official "printed documents printed by government. The Gazette "is evidence of acts of State, and everything done by "the king in his regal capacity. * * * So "the Gazette is evidence to prove the king's proclama- "tion as for performance of quarantine. So the printed "proclamation of peace is evidence without examination "with the parliament roll. The proclamation for reprisals "in the Gazette is evidence of an existing war." "So, "certain things * * * printed or purport- "ing to be printed by the queen's printer are evidence; "thus the articles of war so published are evidence of "them, and copies of royal proclamations purporting to "be so printed, are evidence even without proof that they "were, in fact, so printed." (Starkie, 281). So in *King* v. *Holt*, (2nd Leach's Crown Laws, 593), decided in "1793, it was held that "the Gazette is an authoritative "means of proving all acts relating to the king and the "state"; and where it was necessary to have proved the "articles of war, it is said: "If they had been produced "*as printed by the king's printer*, it would have been "evidence."

"The printed journals of congress have also been "allowed to be read in evidence without proof of their "authenticity." (*Common* v. *Longchamp*, 1784 Norris' Peake, 84 N.)

In *Root* v. *King*, 7th Cowen, 635, SAVAGE, Ch. J., speaking for the court, says: "A printed copy of public "documents transmitted to congress by the president of "the United States, and printed by the printer to con- "gress has been holden to be admissible as evidence."

KENT, Ch. J., (in *Ratliff* v. *United States Insurance Company*, 7th Johnson, 38), says: "A printed copy of "public documents transmitted to congress by the presi- "dent of the United States and printed by the printer to "congress, is admissible."

In 1st Greenleaf on Evidence, section 91, it is said: "Thus the contents of any record of a judicial court and "of entries in any other public books or registers may be "proved by an examined copy. This exception extends "to all records and entries *of a public nature* in books "*required by law to be kept*." One of the reasons there assigned for this, is said to be "because of the public "character of the facts they contain, and the consequent "facility of detection of any fraud or error in the copy."

The same author says, section 482: "In regard to "the journals of either branch of the legislature, a former "remark may be repeated here. * * * * The "journals may also be proved by the copies printed by "the government printer by authority of the house." The same author in section 480, says: "In most, if not all "the United States, the printed copies of laws and "resolves of the legislature published by authority are "competent evidence either by statute or *judicial decision*.

"It is the invariable course of legislatures of the several "States, as well as the United States, to have the laws "and resolutions of each session printed by authority. "Confidential persons are selected to compare copies "with the original rolls and superintend the printing. "The very object of this provision is to furnish the peo- "ple with authentic copies, and from their nature, printed "copies of this kind of either public or private laws are "as much to be depended on as the exemplification veri- "fied by an officer who is a keeper of the record."

This reasoning of the author is in every respect as forcible in its application to the journals so printed *by the public printer*, under the supervision of the secretary of State, as it is in its application to statutes and resolutions.

In *Watkins* v. *Holman, et al*, 16th Peters, Mr. Justice McLean, speaking for the court, said (page 56): "In "this country, in all public matters, the journals of con- "gress and of the State legislatures are evidence, and "also the reports which have been sanctioned and pub- "lished by authority. Its publication does not make that "evidence which intrinsically is not so, but it gives, *in a* "*most authentic form*, certain papers and documents. * * * "The very *highest authenticity* attaches to these state pa- "pers, published under the sanction of congress."

In *Evanston* v. *Gunn*, 99 United States, 666, it was held that the record kept by a person employed by the United States signal service was competent evidence. It is there said: "It may be admitted that there is no statute expressly "authorizing the admission of such a record, * * * "but many records are properly admitted without the aid "of any statute. * * * What is the character of the "instrument?" It "was not a private entry or memo-

"randum; it had been kept by a person whose public "duty it was to record truly the facts stated in it." Speaking of such entries, it is said: "They are of a pub- "lic character, kept for public purposes, and so imme- "diately before the eyes of the community that inaccu- "racies, if they should exist, could hardly escape exposure. "They come within the rule which admits in evidence "official registers or records kept by persons in public "offices, in which they are required, either by statute or "by the nature of their office, to write down particular "transactions," etc.

Taylor, in his Law of Evidence (Section 1530), lays it down as law that articles of war for the government of the army, though not statutes, "being emanations from "the crown, * * * * must, like public acts, be "judicially noticed;" and, he adds, "in order, however, "to instruct the court, a copy purporting to be printed by "the queen's printer * * * should be produced."

We have seen above, by the principle of the common law, these journals upon the trial of an issue of fact to be determined by a jury are competent evidence. The question here, however, is one not to be tried by a jury, but to be determined judicially by the court, and in such case, (as aptly said by Mr. Taylor) "in order to instruct the court, "a copy purporting to be printed by '*authority of law*,' "should be produced."

I cannot doubt, from these authorities and from the reasoning and principle governing them, that the printed journals of the proceedings of the Senate of the State of Illinois—printed in obedience to a mandate of the constitution—printed by the State printer—and printed under the official supervision of the secretary of State, constitute a

reliable source of information to which courts may look, and upon which courts may rely in determining whether a given supposed statute has been passed in the manner required by the constitution.

## II.

### THE EXEMPLIFIED TRANSCRIPT OF THE JOURNAL OF THE SENATE OF 1857.

We agree with counsel for Post (reply brief, p.5), in saying that so far as concerns the act of February 18, 1857, "the "cases now before the court present the simple question "whether it *appears, from the journals* of 1857, that *the* "*act did not pass* as required by the constitution."

They do not deny that the certificate from the secretary of State — produced in court in these cases — does on its face show satisfactorily, that act did not so pass; but they attack the character of the journal record from which that transcript was taken, and insist that "the whole question on the act of February 18, 1857, "is reduced to the simple inquiry of whether the book, "from which the secretary of State gave his certificate, "was the primary journal of the senate, or whether it "was only a professed copy of an original journal." (Page 8—reply brief.)

It is well to be *sure*, that we use words in debate, in *the same sense.* Many disputes, which seem to be about things, are really mere disputes about the meaning of words; parties using the same words to mean different things. It has been well said, "a man may have a *right* "to do many things which are not *right*." Now, if, by the words "primary journal," is meant the first draft of

the journal, in the handwriting of the secretary of the senate, it must be conceded that the parol proof in the Circuit court shows, that the book in question was not that thing. We do not contend that this book was that thing. What we contend is, that this book is the official record of that journal, in obedience to the constitution, made by law the primary and authentic depositary of the contents of that journal, and, in that sense, it is the "primary journal," and in that sense it is "the original journal." In that sense, all of the series of books — now remaining in the office of the secretary of State — containing the legislative journals from 1822, down to 1873, are all "primary journals" and original journals.

It is not denied that, in that sense, they have been so treated from time immemorial, by *every secretary of State* which has held that office since 1819, and are so treated to-day.

It is equally true that the same books have been so treated by the *legislatures* of the State and by *all the courts* of the State.

The findings of the Circuit court in this case, establish the universal usage in the of the secretary of State from time immemorial.

*As to legislative recognition of the journal records.*

Under our territorial government we had a secretary of the territory, who, without any express statute, seems, from the nature of his office, to have been regarded as the keeper of the journals, as "State papers;" for, in 1817, by a resolution, Elias K. Kane was directed to superintend the printing of the journals, and it was made

the duty of the secretary to certify to the auditor that the public printers had delivered in his office the number of volumes of the printed journals.

Under the first State constitution—that of 1818—which declared "Each house shall *keep* a journal of its proceed-"ings, and publish them," a secretary of State was provided for; and in 1819, by statute, he was charged with the safe-keeping of all "*records* deposited in his office" (Session Laws of 1819, p. 87), and required to "cause to "be distributed the printed laws and journals of the gen-"eral assembly."

From the beginning of the State, the journals were first prepared usually on cap or folio paper, and when approved and copied into a book by the clerk of the house and secretary of the senate, and being so copied into the record journal, this first draft was sent as "copy" to the public printer, and when printed was no longer preserved.

The books in which the journals were thus recorded were regularly put in the custody of the secretary of State, under the act of 1819, *supra*, because they were State "*records*." The clerk of the house and secretary of the senate had no permanent offices at the seat of government, and after the business of each session was closed, their functions ended. They were, however, sometimes tardy in finishing up their work. And in 1825 they were required by statute, at *the close of that session*, "to "deliver to the secretary of State all *books*, bills, docu-"ments and papers in possession of either branch of the "general assembly," and he was required "to file the "same in his office." (Laws of 1825, p. 184.)

Let it be observed this was not the beginning of the practice of filing with the secretary of State, the books

containing the proceedings of the legislature—that is, the journals,—for the Circuit court reports that this series of books containing the several journals, runs back to 1822, and this act is in 1825. The object of this act was to require this filing to be done *at the close* of that session, and not when it suited the convenience of these officers. This act was supplemented in 1826 by an act making its provisions applicable to that session, and to all *future sessions*, and this was re-enacted February 15, 1827. (See Revised Laws 1827, p. 324.) In 1826 the secretary of State was required, in distributing printed journals, to *reserve* in his office fifty copies. (Laws 1826, p. 106.) In 1831 the act of 1819, *supra*, was repealed, and the secretary of State was, by a new statute, charged with the safe-keeping of "all records deposited" in his office, and to authenticate transcripts therefrom, by his certificate under the seal of State. (Laws 1831, p. 170.) This is re-enacted in Revised Laws of 1833, (p. 567,) and he is again there charged with the distribution of the printed journals.

Thus the journals were kept in books until 1836, but these books were not well-bound; and so, by act January 16, 1836, it was provided:

SEC. 1. * * * "The secretary of State shall here-
"after superintend the printing of the journals.

"SEC. 2. The journal of each house of the general
"assembly shall hereafter be *kept in well-bound books.*
"The secretary of the senate, and clerk of the house of
"representatives, shall furnish to the public printer, every
"morning during each session of the general assembly,
"a copy of the journal kept by them respectively of the
"day preceding the last day's journal; and the said sec-
"retary and clerk shall, within ten days after the adjourn-

"ment of each session of the general assembly, deposit "*the oiginal journal kept by him, as aforesaid*, with the "secretary of State."

Under this statute, the clerk of each house continued to prepare the first copy of the journal for each day upon cap or folio paper. Usually this was approved by the house on the next morning. During that day it was recorded or copied into the well-bound book, in which this act required the journal to "be kept." On the next morning, this first draft or copy having been recorded was, in obedience to this act, delivered to the public printer, and when printed was never preserved.

Counsel for defendant contend that by the "original journal" thus required to be deposited with the secretary of State, was meant the cap-paper packages (on which the proceedings of each day were first written by the officers of each house) and that they are the things meant in this act by the terms "original journal."

This is clearly an error. The words are "the original journal kept *as aforesaid*," that is, "kept in well-bound books," as had been required in the first sentence of the section. Here is an express recognition by the legislature of that, which was but a part of the well known history of the State; that is, that the books in the office of the secretary of State, containing the journals of each house of the general assembly, had been for eighteen years, and were, at that time, officially recognized as "the original journals." Thus the journals were made, recorded and published until 1840.

In January, 1840, a change was made in the mode of making these record journals. Each house at that time chose a copyist, to record the journal, after it had been

prepared on cap or folio paper by the clerk of the house or secretary of the senate, and was ready for record (see House Journal, p. 9, and Senate Journal 8, of that session,) and from that time until the adoption of the constitution of 1848, such copyist or recorder of the journal was a recognized officer or employee of each house, and paid as such. (Laws 1841, p. 29; Laws 1842–43, p. 12; Laws 1846, p. 6.)

During all this time the first or original draft of the journal, on cap paper, after being recorded, had been sent usually on the morning of the second day after its date, to the public printer as copy, and when printed was thrown into the waste basket; and during all that time the clerk of the house and secretary of the senate, in addition to their per diem pay, had always been paid for these original drafts of the journal, as copy for the printer. (Laws 1821, pp. 171, 172; Laws 1823, p. 164; Laws 1825, p. 180; Laws 1826, p. 91; Laws 1826–'27, p. 63; Laws 1827, p. 61; Laws 1828, p. 8; Laws 1830, p. 9; Laws 1832, p. 74; Laws 1835, p. 4; Laws 1836, p. 241; Laws 1836–'37, p. 4; Laws 1838, p. 114; Laws 1839, pp. 81, 82; Laws 1841, p. 29; Laws 1842, p. 12; Laws 1846, p. 6.)

I have thus traced this legislative history with care, that we may appreciate and understand the circumstances under which the language of the constitution of 1848 and of the act of 1849 was used; that it may not be misunderstood.

In this condition the constitution of 1848 declared that "the general assembly shall provide by law, that *the copy-*
"*ing the journals* shall be let by contract to the lowest "responsible bidder." (Art. III, sec. 39; see R. S., 1874, p. 45).

In obedience to this constitutional command the act of Feb. 12, 1849, was passed. (Laws 1849, p. 95). By this statute the secretary of State was required, previous to the meeting of any future general assembly, to advertise for proposals for copying the laws, joint resolutions and *journals* of the general assembly, and to contract for doing the same. He was also "required to furnish a well-"bound book in which the journals shall be copied." The act also provided that "in case the person contracting for "said copying shall fail to comply with his contract, &c., "the secretary shall cause the same to be done by some "*competent* person."

This law was in force until long after the journal of 1857 was made.

From 1849 until 1873, a period of twenty-four years, the journal records were made under this statute. It differed from the mode before that in use, *only* in this: The copying of the journals into the record books, for safe keeping in the office of the secretary of State, from 1819 to 1840 (21 years) was done by the clerks of the house and secretaries of the senate; the same work from 1840 to 1849 (9 years) was done by copyists appointed by each house of the legislature; and the same work was done by competent and responsible copyists selected and employed for that purpose by the secretary of State, from 1849 until 1873—a period of 24 years. These "mere copies "of the journals," found in these books for over fifty years, were supposed by all the statesmen of Illinois to be "the journals"—the original record of legislative proceedings—and were so treated by every legislature having anything to do with the subject during all that period. It must be assumed that these legislatures, or at least some

of them, felt bound to obey the constitution. During fifty years the constitution expressly required each house *to keep* a journal of its proceedings. Unless such journal was *kept* in these books, that provision of the constitution was never obeyed. In fact no one ever conceived that there was any doubt on that subject—until it occurred to our adversaries and was brought forward by them in the case of *Miller* v. *Goodwin*. Then, and not till then, did the legislature provide for the preservation of the cap-paper parcels. This was done by act April 29, 1873, out of abundant caution, while *Miller* v. *Goodwin* was pending, and before the Supreme court had passed on that question.

In all acts of the legislature, passed prior to that act, wherever the words "original journals" were used, these words were used to designate the journals kept in books in the office of the secretary of State. This is plainly shown, by necessary implication, from the words of that act of 1873. That act, speaking of the cap-paper parcels describes them as "the original journals *prepared by the sec-retary* of the senate and the *clerk* of the house." This language was used to distinguish this draft of the journals from what had for all time before been regarded and treated by all departments of the State government as "the original journals," which was kept in books in the office of the secretary of State.

That act changed the plan of making original journals. Before that they were made by copying the first draft into books; and the first draft had always been sent to the printer for copy. By that act this first draft is required to be "securely bound in books;" and the copies made from this first draft are to go to the printer.

When the legislature chose to change the mode of making the books, in which the journals should be kept, it in no manner impaired the authenticity of the books already there.

*The courts of Illinois have always recognized these books as the journals.*

In 1853 the Supreme court of Illinois passed upon a supposed statute and held it void, saying: "The journal of the house of representatives fails wholly to show that "the act in question was ever put upon its passage in that "house." The journal here spoken of was the book in the office of the secretary of State, in which the proceedings of the house had been copied by the copyist employed by the secretary of State under the act of 1849, and not the cap-paper packages made by the clerk of the house, for these were not preserved. (*Spangler* v. *Jacoby*, 14 Ill., 300.) The court says: "When an act has gone "through all the forms of legislation, it is deposited in the "office of the secretary of State. The journals of the "two houses take the same direction," referring to Sec. 8, Chap. 96, R. S., 1845, which says: "The secretary of "the senate and clerk of the house, at the close of each "session, * * * shall deliver to the secre- "tary of State all books, bills, documents and papers in "possession of either branch of the general assembly, "correctly labeled," &c. The cap-paper parcels were not in the possession of either branch of the general assembly; for they had all gone to the printer for copy. But the books made by the copyists, "correctly labeled," were, in such possession at the close of each session; and were deposited in the office of the secretary of State. And all this was known to the Supreme court. The reference here was plainly to this journal record.

These remarks are equally applicable to the journal passed upon at December term 1855, which was the journal of 1852–53. (*Turley* v. *Logan Co.*, 17 Ill., 151.)

The same is true of the journal of 1851, passed upon, *six years after* in 1857, (*Prescott* v. *Canal Trustees*, 19 Ill., 324.)

It is in that case where the court said the true history of the bill had been ascertained "by a careful examination, not only of the printed journal, but of the *original manuscript* journal of the session of 1851." What original manuscript was this? Surely not the cap-paper packages, each of which contained the proceedings of one day in one house:—and each of which, after having been recorded and printed in 1851, had, six years before, gone to the waste basket. The Supreme court here style the well-bound book in the office of the secretary of State, "the original *manuscript* journal," and this to distinguish it from the original printed journal.

The same is true of the journal of legislative proceedings in February, 1855, passed upon by that court in November, 1860, more than five years after the cap-paper journals were destroyed. (*Schuyler County* v. *R. I. & A. R. R. Co.*, 25 Ill., 181.)

The same may be said of the journal considered at December term, 1863, in (*The People* v. *Hatch*, 33 Ill., 9.) And again at the April term of 1865, (*R. R. Co.*, v. *Hughes*, 38 Ill., 174.)

And of journal of January 1863, considered by the court at the April term, 1864. (*People* v. *Sterne*, 35 Ill., 121.)

The same is true of the journal spoken of in *Ill. Cent.*

*R. R. Co.*, v. *Wren* (43 Ill., 79), at the December term, 1867. The act in question there was that of February 5, 1857, laws 1857, p. 49. That was the *very* journal, in controversy in the case at bar, and related to proceedings only 11 days before the proceedings in this case. The court was discussing that subject ten years after this journal record was made. The court speaks of this journal as one in existence. It will not be assumed that the courts of Illinois were ignorant of the usage, which had prevailed for fifty years of destroying what plaintiffs call the original journal. Yet the court speaks of an original journal then in being.

Thus it is apparent that these books,—the journals in the office of the secretary of State—have from the beginning been treated *as records*, by every department of the State. They were so treated, *without question*, by the executive officers, by the legislatures, and by the courts, for fifty years before these bonds were issued.

Being *records* they import absolute verity, and cannot be contradicted, explained, aided or impaired or impeached by parol evidence.

1st. Greenleaf Ev., sec. 482; 20 Conn., R 16; 1st Met. Ky., 295; Jefferson's Manual, sec. 43; 10th Shep., 123; 2nd Pick., 397.

If therefore the case of *Miller* v. *Goodwin*, 70 Ill., 660, had never been decided, and this were an open question to be decided for the first time by this court, no conclusion could rationally be reached, other than the conclusion reached by the Supreme court of Illinois. I maintain that the reasoning of that case is sound and unanswerable.

Mr. Phillips, in his argument, has shown that it *paramount* authority in this case. I will not repeat th argument.

Hay & Littler, in their argument, strenuously conten that the decision in that case is not binding on the client, because, forsooth, the bondholders were not mad parties to that record. If we had pleaded or set up th decision as a bar to this action, as *res judicata*, the might be force in their argument. They treat the cas as though that were so. We do not present it as a ba to this action. We merely cite it as a *controlling autho ity*. As well might they insist that they are not boun by *Spangler* v. *Jacoby*, or by any of the long line authorities of that class, for the bondholders were n there made parties. They are fighting, not our positio but a man of straw of their own making.

We show that the case was defended in the interest the bondholders, merely to make it manifest that it wa done vigorously and in good faith; that it was not a suggested by them a family affair.

Mr. Eldridge says, that he had nothing to do with th case. It must be that the work was done wholly by h *then partner*, Mr. Lewis. It is certain that the report the case shows, his firm, "Eldridge & Lewis," appeare in support of the same positions now so ably urged b him. Mr Phillips has fully presente

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*The constitution of the United States and acts of congress.*

Make the *usage* in the courts and offices of Illinois controlling.

This question is a question of what shall be competent

and primary evidence of the contents of State papers. The law on that subject may at any time be altered by a State legislature or established by the decision of the highest State court. Such decision is binding everywhere. Every State must have the power to decide upon the authenticity of its own archives. And the Supreme court of Illinois has decided that the well-bound book is the official journal, and primary evidence.

*Miller* v. *Goodwin*, 70 Ill.

The Constitution of the United States provides: "Full "faith and credit shall be given in each State to the pub- "lic records of every other State. And, congress may, "by general law, prescribe the manner in which such "records shall be proved, and the effect thereof."

Congress has provided that, "All records or exempli- "fications of books, which may be kept in any public "office of any State, * * * shall be proved or ad- "mitted in any court or office of any other State, by" (certain attestation described.) "And the said records "and exemplifications, so authenticated, shall have such "faith and credit given to them in every court and office "within the United States, as they have by law or usage "in the courts or offices of the State from which they are "taken."

Revised Statutes U. S., 1873-4, Title 13, Chap. 17.

Now, if we have shown—by the statutes on the subject—by the usage in the office of the secretary of State—and by the decisions of the Supreme court of this State—that this well-bound book has such faith and credit given to it in the courts or offices of Illinois—that it clearly shows what was really entered upon the journal

of the senate of 1857—then it is clear an exemplification from it, properly authenticated, would be conclusive upon a Federal court in Kentucky—or any other State. It follows, logically, this should be satisfactory in a Federal court in State of Illinois, on a question, which the express mandate of the Supreme court of the United States directs shall be determined upon evidence such as is legally applicable to such a case, "according to the laws of Illi-"nois."

The rules of evidence adopted by the State courts are rules of decision for the Federal courts sitting in their borders.

*Ryan* v. *Bindley*, 1 Wall., 66.

This being so, in the absence of any other legislation on the subject, the question of the admissibility of this transcript would be controlled by the act of 9th of March, 1869, which recites that, "Copies of all bonds, papers, "writings and documents legally deposited in the office of "the secretary of State, when certified by the secretary "of State, and authenticated by the seal of his office, "shall be received in the same manner, and with like "effect as the originals."

1 Gross' Statute, Ed. of 1869, p. 681.

This clearly establishes that the journal record, or "*the* journal," as written in *books*, and filed in the office of the secretary of State has always been regarded, from the very beginning of this State, as *the journal* which was mentioned in the constitution; and that the cap-paper packages which were prepared by the clerk of the house and secretary of the senate, to be transcribed into this journal record, never did constitute any part of the archives of the State; and whether that journal record was

made by the clerk of the house and secretary of the senate, as officers of each house, or whether it was made by a copyist elected by each house for that purpose, or whether it was made by a copyist selected under the provisions of the constitution of 1848, and the act of 1849; by which the secretary of State was to let that service by contract,—it was nevertheless *the journal*, which is mentioned and contemplated in the constitution, and is the highest source of evidence as to what the proceedings of the legislature were.

Unless the contents of the journals may be lawfully proven by the journal records in the office of the secretary of State, or by the printed journals, there is no other possible mode by which any of the journals of the general assembly, prior to 1873, can be lawfully proven for any purpose.

Counsel for defendants say this is a mere copy. As well might we say their transcript of the enrolled bill in this case should not be received, for it is a mere copy. It is not the original bill on which the general assembly voted. This enrolled bill was never voted on in either house; it was the original which was voted upon. This idea of degrading this record journal is really so unreasonable, that were it in an ordinary law suit, the proposition would be scouted in any court under heavens. It is only the hope founded upon a supposed leaning of the Federal courts in favor of the holders of municipal bonds that could by possibility bring good lawyers to seriously urge such a position.

An hypothesis was suggested, that suppose the original draft of the journal prepared by the secretary of the senate in this case could be produced, and that, when

produced, it should be found to contain material matter not found in the journal record; and the question propounded upon that hypothesis was, to which should be given the highest credit—which would be the highest authority; and which should prevail?

It is not necessary to answer that question in order to solve the question now before the court. These documents might possibly be regarded as duplicates, and in such case, affirmative matter found in one which was omitted in the other, might be regarded as proved.

I say *might be*. My own view of the law is, that if a document purporting to be the first draft of the journal, prepared upon cap paper and fastened together at the top by the secretary of the senate, was now produced in antagonism to the record of the journal, it would require authentication. It was never required by law to be preserved by any public officer, or in any public office; and in my opinion oral evidence of a loose package of papers not filed in any public office, or required by law to be so filed or kept, could not be allowed by law to be proven by parol as the original draft of the journal, and used to vary the statements contained in the record journal. But this is a conundrum that does not arise in this case, and needs no further discussion.

## Miscellaneous.

It is suggested, that this act may have been passed, constitutionally, on a vote by ayes and noes, really entered on the journal by the secretary of the senate; and that the entry of this part of the proceedings may have been lost before being transferred to the record. Reliance for

this, is placed upon the finding, as to *some* of the proceedings of that session, that the cap-paper packages went to the printer before being recorded. A conclusive answer to this suggestion is found in finding eleven (pr. page 38 of the record), that "the proceedings of the 16, 17, 18 and 19th of Feb., 1857," were *not prepared until after the adjournment* of the legislature on the morning of the 19th, and that "they *were transcribed* in 'said well-bound "book,' before being sent or taken to the printer."

Here is a specific finding of a fact absolutely incompatible with this suggestion. The court finds that the proceedings here in controversy were actually "transcribed" into the books; not, that a *part* of the proceedings were so transcribed, but that "*the proceedings*" of the last four days of the session.

Counsel say this was shown only by parol. It is only by parol that they show this record was not made before adjournment, and approved by the senate. It is proof which *they* introduce against *our* protest. They must not disparage such parts as they do not like.

*Their own parol evidence kills their statute.*

Before a statute can have force under the constitution of Illinois, there must be an entry on the journal of the senate, showing its passage on a vote by ayes and nays with the concurrence of a majority of all the senators elect. Under the constitution, it is the senate which is required to keep a journal. When the senate adjourned there was no such entry upon the journal, for no journal of the last four days had been prepared. No such entry could have afterwards received the sanction of the senate. When the senate adjourned, *that bill*, although signed and approved

by the governor, was not then a law. Can the secretary of the senate, after the senate adjourns, make that a law, which was not a law at the time of the adjournment? Certainly not. Gentlemen are treading on dangerous ground. I do not doubt that a journal, although in fact written out after adjournment, may be a valid journal. But this can *only* be maintained upon the safe ground that the record imports verity. The record purports to speak as of the day of its date. Hence, it is assumed to have the sanction of the senate. Upon this ground only the ordinary proceedings will stand the test. Once allow the record to be assailed by parol proof, and we reach danger. Be this as it may—if you take the record in this case, it shows no such entry. If you assail the record by parol proof you must follow your parol proof to its results. Following that, we find that the senate never caused an entry of the passage of this bill on its journal, for there never was any valid journal of any of the proceedings of these last four days. Either horn of the dilemma is fatal to this statute.

The Supreme court of Illinois has never held or even intimated that, whether the necessary entry was or was not made on the journal, is a question of fact to be submitted to a jury. They have called it a question of fact. In one sense it is a question of fact, but it is a fact to be judicially determined, and so that court holds. It has sometimes been determined upon a certificate of the contents of the journal. It has been adjudged for the particular case on the admission of the parties. Sometimes it has been decided from an examination of the journal. The rule adopted is that, that court will not notice the question on appeal, unless first submitted to the Circuit court, with

the proofs to inform the court, set out in the record. This is a rule for convenience. Other courts refuse to notice the statute of frauds or a statute of limitations, unless pleaded. This is a mere rule of practice.

T. Lyle Dickey.

FILED
APR 3 1882
JAMES H. McKEN

2-1

# TRANSCRIPT OF RECORD.

# SUPREME COURT OF THE STATE OF ILLINOIS,

## NORTHERN GRAND DIVISION.

MARTIN B. MILLER ET AL.

VS.

JEREMIAH GOODWIN ET AL.

R. O. POLKINHORN, PRINTER, Washington, D. C.

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At a Supreme Court, begun and held at Ottawa, on Tuesday, the ninth day of September, in the year of our Lord one thousand eight hundred and seventy three, within and for the Northern Grand Division of the State of Illinois:

Present— SIDNEY BREESE, *Chief-Justice.*

PINKNEY H. WALKER, *Justice.* JOHN M. SCOTT, *Justice.*
W. K. MCALLISTER, *Justice.* B. R. SHELDON, *Justice.*
JOHN SCHOLFIELD, *Justice.* ALFRED M. CRAIG, *Justice.*

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MARTIN B. MILLER
AND
HENRY C. PADDOCK
*vs.*
JEREMIAH GOODWIN, ET AL.

} Appeal from Kane.

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Be it remembered that heretofore, to wit: on the nineteenth day of May, in the year of our Lord one thousand eight hundred and seventy-three came MARTIN B. MILLER and HENRY C. PADDOCK, by B. F. PARKS and E. N. LEWIS, their attorneys, and filed in said Supreme Court a transcript of the Record and Proceedings of the Circuit Court of the County of Kane, in the words and figures following, to wit:

1 UNITED STATES OF AMERICA, }
*State of Illinois, County of Kane.* } *ss.*

Pleas before the Honorable Silvanus Wilcox, Judge of the fourth judicial circuit of the State of Illinois, and sole presiding Judge of the Circuit Court of Kane County, in the State aforesaid, and at a term thereof begun and held at the court house in the town of Geneva, in said county, on the first Monday (being the fifth day) of May, in the year of our Lord one thousand eight hundred and seventy-three, and of the independence of the United States the ninety-seventh.

Present:

Honorable SILVANUS WILCOX,
*Judge of the Fourth Judicial Circuit of the State of Illinois.*
ALBERT J. HOPKINS,
*State's Attorney.*
JAMES C. BROWN,
*Sheriff of Kane County.*

Attest:

HENRY T. ROCKWELL, *Clerk.*

The court was opened by due proclamation according to law.

2 Be it remembered that heretofore, to wit, on the 5th day of May, A. D. 1873, the same being one of the days of May Term, 1873, of said court, the following, among other, proceedings were had and entered of record in said court, to wit:

JOSIAH D. DUNNING *et al.* }
*vs.* } *Bill.*
MARTIN B. MILLER. }

This day comes the defendant, by Parks and Lewis, his attornies, and moves the court that the bill herein be filed as of the 20th day of February, A. D. 1873, and the answers as of the 8th day of March, A. D. 1873.

And, also, to wit, on the 5th day of May, 1873, the same being one of the days of May Term, 1873, of said court, a motion was filed in said court in the words and figures following, to wit:

J. D. DUNNING *et al.* *vs.* MARTIN B. MILLER. } *Kane County, Circuit Court, May Term, A. D. 1873.*

And the said defendant comes and moves the court to order the bill in the above case to be filed as of the 20th of February, A. D. 1873, and the answer and affidavit accompanying. The same to be filed as of the 8th day of March, A. D. 1873; and that the case may be placed upon the docket in the place, where, by that filing, it would belong.

B. F. PARKS, A. G. MCDALE,
E. N. LEWIS, C. D. F. SMITH,
*Sol. for Deft.*

3 And, also, to wit, on the 6th day of May, 1873, the same being one of the days of the May Term, 1873, of the said court, a bill was filed in said court in the words and figures following, to wit (which bill, by order of court, was filed as of February 20th, 1873):

STATE OF ILLINOIS, *County of Kane.* } *ss.* *In the Kane County Circuit Court, in Chancery sitting. To the March Term, 1873.*

To the Honorable Sylvanus Wilcox, Judge of the said Kane County Circuit Court, in Chancery sitting:

Your orators, Jeremiah Goodwin, Anton Loser, Adam Oxenslager, George Daily, Erasmus D. Bradley, William A. Tanner, (and William A. Tanner and Henry Tanner, partners, by the name and style of Tanner & Son,) and Robert Johnson, Colcott Stowell, Josiah D. Dunning, George Hadden, Loren Gillett and Simeon Van Alstine, B. Street, Cornelius Freeman, Wm. W. Bishop, Horace N. Goodrich, all of the city of Aurora, except Gillett and Van Alstine, all of the town of Aurora, Kane County, Illinois, humbly complaining, show unto your Honor that they are all residents of the said city of Aurora in said town of Aurora, except the said Gillett and Van Alstine, and are severally owners of property in said town and tax payers in said city, except the said Gillett and Van Alstine. That under and by virtue of a certain pretended statute of the State of Illinois, pretended to have been approved on the 18th day of February, 1857, and entitled an act authorizing certain cities, counties, incorporated towns and townships to subscribe to the stock of certain railroads, a majority of the legal

4 voters of the said town of Aurora, on the 26th day of February, 1869, voted that the said town of Aurora should subscribe to the stock of the Ottawa, Owego, and Fox River Valley Railroad Company to the amount of $60,000, and to issue the bonds [of] of said town for that amount. That immediately after such vote was taken the supervisor issued, or caused to be issued, bonds of the said town of Aurora to the amount of said sixty thousand dollars, all drawing interest at ten per cent. per annum, payable annually. That said bonds were issued in persuance of said vote and under and by virtue of said pretended statute, and by virtue of no other authority whatever. That the tax collector of the said town of Aurora, to wit, Martin Miller, has now in his hands, and issued to him, the warrant for the collection of the taxes of the said town of Aurora, and in said collector's warrant there is about the sum of $15,000, which the said collector is about to collect, and threatens so to do for the purpose of paying the principal due, or about to become due on said bonds, and also the interest about to become due on said bonds; and your orators further state that by the said collector's warrant the said collector is directed to collect of each of the parties above named the following sums, which are set opposite their respective names, for the purpose of paying said interest and principal due, or about to become due, on said bonds:

| | | |
|---|---|---|
| Jeremiah Goodwin | $26 | 96 |
| A. Loser | $16 | 13 |
| A. Oxenslager | $13 | 92 |
| George Dailey | $4 | 33 |
| E. D. Bradley | $5 | 13 |
| Wm. A. Tanner | $69 | 98 |
| Tanner & Son | $11 | 05 |
| 5 Robert Johnson | $9 | 18 |
| C. Stowell | $3 | 71 |
| Josiah D. Dunning | $45 | 64 |
| George Hodden | $39 | 47 |
| Loren Gillett | $21 | 48 |
| Simeon Van Alstine | $10 | 18 |
| C. Furman | $8 | 40 |
| Wm. W. Bishop | $53 | 31 |
| H. N. Goodrich | $20 | 46 |
| B. Street | $18 | 68 |

And your orators further say that the said pretended statute never passed the Senate of the State of Illinois, as shown by the Journal of said Senate, and never, therefore, became a law. That the Journal of the said Senate for that year does not show that a majority of all the members elected to said Senate voted in favor of its passage, nor does the said Journal show that the ayes and noes were taken, on the final passage of said statute, and entered on said Journal, nor does the said Journal show that said statute was ever passed in any way. That a true copy of all the Senate and House Journals do show concerning the passage of said statute, and what they do show on that subject is hereto attached, marked Exhibit A, and which your orators pray may be taken as a part of this bill of complaint. And your orators further say that the said bonds were issued in payment
6 of the said subscription of the said town of Aurora, to aid in the construction of said railroad, and that the said town of Aurora is entitled to stock in said railroad to the said amount of $60,000, in accordance with the terms of said subscription, and that said bonds have been mostly sold and disposed of by said railroad company, as your orators are informed and believe, but that the said Ottawa, Oswego, and Fox River Railroad, with all its property and franchise, about the time of completing the same, was, by the officers and managers of said Road, virtually sold out to the Chicago, Burlington, and Quincy Railroad, and that the stock of said Fox River Valley Railroad was, by such sale, rendered entirely worthless, as your orators are informed and believe, and of no value whatever. And your orators further state that, at the last town-meeting of the said town of Aurora, the supervisor of said town reported that there was then in his hands, to be used for general town purposes, the sum of $1,373.65, as by a copy of his said report hereto attached, marked B, will fully appear, and which your orators ask may be taken as part of this bill. And your orators further state that the commissioners of highways also reported, at said meeting, that they had in their hands about the sum of about $1,500 to be used for road and bridge purposes for the coming year, as will appear by the said report of said highway commissioners, hereto attached, marked Exhibit C, which your orators ask may be taken as part of this bill of complaint; and

your orators state that nothing, since making said
7 reports up to the 12th of August, 1872, occurred, making it necessary to raise any more money for general town purposes, nor for road and bridge purposes, as your orators are informed and believe, except what could be raised by the poll tax; but your orators further say that the board of town auditors of said town of Aurora, at a meeting of said board on said 12th day of August, 1872, audited and allowed the further sum of $1,000 for general town purposes, and that said amount the said board of supervisors of said Kane County caused to be levied upon the taxable property of said town, and the said amounts are in said collector's warrant, and he threatens to collect the same by levying on the property of your orators. That the said auditors never audited the sum of $7,000, or any other amount for road and bridge purposes, but that the said sum of $7,000 is inserted in the tax to be collected by the said collector, and he is about to collect the same by virtue of his said warrant—but by what authority the same was inserted your orators have no knowledge or belief.

And your orators further say that the said collector's said warrant was first delivered to him on or about the 15th day of December last. That since said time, the said warrant has been returned to the county clerk of said Kane County, and was kept by him several days, and while so in possession of said clerk the several amounts in said warrant levied against your orators and others, respectively, for taxes, were changed by the said clerk, and the said collector's warrant was in other respects altered by the said clerk without any authority whatever, as your orators are informed and believe, and the same was then returned to said collector. And your orators further state that a
8 true copy of said taxes assessed against your orators severally for road and bridge purposes, general town tax, Ottawa and Oswego and Fox River Railroad tax, city tax, and Chicago and Iowa Railroad tax, are hereto attached, marked Exhibit D, and which your orators ask may be taken as part of this bill. That the said amounts in said copy under the head of "special town tax" is the amount to be collected for the payment of principal and interest on the bonds issued by the said town of Aurora to aid in the construction of the Chicago and Iowa Railroad as above stated, and that the amounts in the column

headed "Registered Bond Tax," are the amounts to be collected of your orators respectively for a payment on the bonds issued by the said town of Aurora to aid in the construction of the said Ottawa, Oswego and Fox River Valley Railroad; and your orators further state unto your Honor that the whole amount audited and allowed by the board of town auditors of the town of Aurora, at their meeting held on the 12th day of August, 1872, for the payment on the bonds of the Oswego, Ottawa, and Fox River Valley Railroad, was $10,000 only, as will appear by a true copy of their report, hereto attached, marked Exhibit E, and which your orators ask may be taken as part of this bill; that the said auditors never audited at any time any amount for the purpose of payment of the bonds issued in aid of the Chicago and Iowa Railroad, or any part thereof, and that the said amounts in the column headed "special town-tax," in said Exhibit D, were never legally assessed,

9 and cannot be legally collected of your orators, as they are informed and believe. And your orators further say that, by charter of the said city of Aurora, a city assessor was elected at the last charter election in March last, and he was to make the assessment of property in the said city of Aurora, on which the tax for city purposes was to be based, and that in the spring and summer of the year 1872, the said city assessor made such assessment, but that the tax for city purposes, in the column headed "city-tax," in Exhibit D, was not based on the said city assessment, but the same was based on the assessment made by the town assessor, which was very different from the said city assessment. That by said town assessment it is utterly impossible to determine how much tax should be paid over to the said city of Aurora, for the reason that there is not, in said town assessment, anything to indicate what property so assessed was in said city of Aurora; that some farms and lands lie partly in and partly out of the said city, and that by said town assessment they are assessed as a whole without assessing the part that lies in said city separate from the part that lies out of the same, nor is there anything in the manner said town assessment was made, or upon the same, to indicate what property was in said city and what was beyond the limits of the same, as your orators are informed and believe, and your orators claim, for the reasons above stated, that the whole of the said

taxes in Exhibit D are wholly void and invalid, but that the same are included in the collector's warrant; and he threatens and is about to collect the same by levying on the property of your orators, respectively— and will do so unless restrained by injunction. And your orators further state that the statute incorporation the Chicago and Iowa Railroad Company, and under and by virtue of which the said bonds of the town of Aurora were issued, in aid of said road, requires that the petition or application for the call of an election shall state the rate of interest the bonds to be issued in aid of said Road shall draw, and the time of the payment of said bonds; but your orators allege that said petition does not state the rate of interest the said bonds were to draw, nor does it state when they were to be payable, nor is there anything in said petition on this subject, as your orators are informed and believe, nor is there anything in the notices calling said election on the subject of interest, or when said bonds shall become due, nor did the legal voters of said town of Aurora vote on either of said questions; that the supervisor and town-clerk of said town, notwithstanding the defects in said election proceedings, as above stated, on or about the month of November, 1870, issued bonds of the said town of Aurora, in aid of the construction of said Chicago and Iowa Rail Road to the amount of $100,000, drawing interest at the rate of ten per cent. per annum, payable annually, $10,000 of the same becoming due July 1st, 1876; $10,000 due July 1st, 1877; $25,000 due July 1st 1878; $25,000 due July 1st, 1879, and $30,000 due July 1st, 1880; that there is in said collector's warrant, under the head of special town tax, the sum of $10,000 to be collected out of the taxable property of the said town of Aurora, and that the said several sums, under the head of Special Town Tax in said Exhibit D, are the amounts to be collected out of your orators respectively, by said collector, as shown by said Exhibit, for the payment of interest on said bonds issued to said Chicago and Iowa R. R. Co. That said last amount was not audited nor allowed by said auditors, nor authorized by them in any way to be put into the tax for the year 1870; neither did a majority of all the legal voters in said town, at the time of said election, vote for issuing bonds in aid of said Rail Road; and your orators further state that at the time of the election

to vote aid to the Ottawa, Owego and Fox River Valley Rail Road Company, to wit, on the 26th day of February, 1869, a majority of all the legal voters of said town of Aurora at that time did not vote for such subscription to said last-named Rail Road, as they are informed and believe; that at each of the times the said votes were taken there were living in said town of Aurora upwards of 2,000 legal voters. That about 813 legal voters of said town voted in favor of the aid to the said Chicago and Iowa Rail Road, and about 400 against the same; and your orators further state that by the charter of the city of Aurora the corporate authorities of the said city can not raise by taxation to pay the general, contingent, and other expenses of said city, a sum exceeding one and one-half per cent. on the assessed value of the real and personal property within said city. That they, the said corporate authorities have caused to be certified to the county clerk the sum of about $25,000 (Twenty-five Thousand) to be raised by taxation for city purposes, as your orators are informed and believe, andthe same is put into said collector's warrant, and is in said Exhibit D,
12 under the column headed city tax, and the amount that each of your orators is required to pay is set opposite their respective names in said exhibit; and that the said $25,000 is fully 1½ per cent. on the assessed value of said city property; and that the larger portion of said $7,000 for road and bridge purposes will be collected out of the real and personal property within said city, and that the said $25,000, together with the said larger proportion of the said $7,000, will be more than one and one-half per cent. on the assessed value of the real and personal property in said city; and your orators further say that by the poll tax allowed by the present law to be assessed for highway purposes, there will be realized out of the same during the present year between four and five thousand dollars, there being residing in said town upwards of 2,000 persons liable to pay the same, and if, in addition, another poll tax can be collected under and by virtue the city charter, there will be realized, in addition to the above, about the further sum of $3,000 for highway purposes; and your orators allege and state that neither the public interest nor necessity require the expenditure of $7,000 in addition to the poll tax on the roads and bridges in said town of Aurora,

nor anything like that sum. That the sum on hand, on or about April 1st, 1872, as shown by Exhibit C, together with what will be realized under the law for poll tax, will be amply sufficient for all highway and bridge purposes during the ensuing year; and your orators are informed and believe that the said $7,000 was inserted in said
13 tax warrant for the purpose of raising monies for other purposes than for roads and bridges, and that the same, if collected, will be used by said commissioners, or the treasurer thereof, for his own benefit, or for purposes not authorized by law.

And your orators further state that Henry C. Paddock is the county Treasurer of the said County of Kane, and has, at this date, to wit, May 5, 1873, advertised that he would, on the 3d Monday of this present month take judgment for all of above taxes, in the county court of said Kane County.

These six lines were inserted by agreement this 5th day May, 1873.

And your orators further state that there is nothing, as your orators are informed and believe, upon the records of the said town of Aurora showing what proceedings were had concerning voting aid to the Ottawa, Oswego, and Fox River Valley Railroad, except that such an election was held on or about the 26th day of February, 1869, and about 1,050 voters voted for the subscription of $60,000 to aid in the construction of said railroad, and about 561 voted against the same; and that there [is] nothing in said record showing that the voters voted on the questions what interest these bonds should draw, nor when they should become payable. And your orators further say that the said bonds issued in aid of each of said railroads, as above mentioned, have, as your orators are informed and believe, been sold and disposed of to various individuals unknown to your orators, the most of whom are non-residents of the State of Illinois; your orators ask, therefore, that an injunction may issue restraining the said Martin Miller, the town collector of the said town of Aurora, from collecting,
or attempting to collect, the said sums set opposite
14 the names of your orators respectively in exhibit D, out of property of your orators.

Amended by agreement May 5th, 1873, by interlining.

And that the said Henry C. Paddock be restained from collecting the same or from taking judgment for the same in said County Court.

And that the said Miller and the said Paddock may appear at the next term of this court and answer this, your orators' bill of complaint, answer under oath being hereby waived, and that your orators may have such other or further relief in the premises as shall be agreeable to equity and good conscience.

May it please your Honor to grant unto your orators an injunction enjoining and restraining Martin Miller, the tax collector of the town of Aurora, in said Kane County, from collecting, or attempting to collect, the amounts respectively in his said tax warrant, set opposite your orator's names respectively for "Road and Bridge Tax," "Special Town Tax," "Registered Bond Tax," "City Tax" and "General Town Tax."

Amended by agreement May 5th, 1872.

And that Henry C. Paddock, the county treasurer of Kane County, be enjoined from collecting or taking judgment for the same in the County Court of Kane County, until the further order of this Court.

May it please your Honor to grant unto your orators a summons directed to the said Martin Miller, commanding him to appear at the next term of this court and answer this bill, and your orators will ever pray.

E. D. BRADLEY,

ANTON LOSER,
C. STOWELL,
A. OCHSENSLAGER,
LOREN GILLETT,
S. VAN ALSTINE,
C. FURMAN,
W. W. BISHOP,
GEORGE M. HODDEN,
J. D. DUNNING,
J. GOODWIN,
WILLIAM A. TANNER,
W. A. TANNER and SON,
ROBERT JOHNSON,
B. STREET,
G. W. DAILY,
H. N. GOODRICH.

STATE OF ILLINOIS, }
*Kane County.* }

Josiah D. Dunning, being first duly sworn, doth say that he has heard read the foregoing bill of complaint by him signed, and knows the contents thereof, and that the same is true in all respects of his own knowledge, except the statements in the exhibit marked D, and except as to matters stated on information and belief of complainants, and as to those matters stated on information and belief, he has been so informed and believes them to be true.

[NOTARIAL SEAL.] J. D. DUNNING,

Subscribed and sworn to before me, February 15, 1873.
WILLIAM LORD, JR., N. P.

STATE OF ILLINOIS, }
*Kane County.* }

William A. Tanner, being first duly sworn, doth depose and say that he, together with town clerk, took from the town collector's book, of the town of Aurora, the names and amounts in said exhibit D, and knows the same to be correct, as shown by said book; that he has heard read the above bill of complaint by him signed, and believes the same to be true in all respects.

WM. A. TANNER,

Subscribed and sworn to before me February 15, 1873.
[NOTARIAL SEAL.] WILLIAM LORD, JT., N. P.

EXHIBIT E.

Meeting of the Board of Town Auditors of the town of Aurora, held August 12th, 1872, present: Charles
16 Wheaton, Supervisor, and Justices of the Peace Adam Phy, Ira H. Fitch, H. F. Van Nortwick, R. W. Gates, C. H. Adams and W. J. Pollock, clerk. On motion [of] R. Wilder Gates, it was voted to certify to the County Clerk that [it] is necessary to raise by taxation ten thousand dollars for the payment of the bonds of the Ottawa, Oswego and Fox River Valley Railroad Co., coming due July 1st, 1873; also, on motion of H. F. Van Nortwick, that one thousand dollars be raised for general town purposes.

On motion, adjourned.

CHAS. WHEATON, *Supervisor.*

C. H. ADAMS, *J. P.*
IRA H. FITCH, *J. P.*
H. F. VAN NORTWICK, *J. P.*
ADAM PHY, *J. P.*
W. J. POLLOCK, *Town Clerk.*
R. W. GATES, *J. P.*

I, W. J. Pollock, Town Clerk of the town of Aurora, Kane County, and State of Illinois, do hereby certify the foregoing proceedings of the Town Auditors and the annexed reports marked F, G, and H, are true copies from the records of said town of Aurora, in my office.

Dated, *January 29, 1873.*

"F." At the annual town meeting held in the town of Aurora, Kane County, and State of Illinois, at the City Hall, in the city of Aurora, on the 4th day of April, A. D. 1871, the following, among other proceedings, were had, to wit: The report of Charles Wheaton,
17 Supervisor, was read by the clerk, which was, on motion, ordered to [be] spread upon the Town Record, and is as follows, to wit:

Report of Charles Wheaton, Supervisor of Aurora, to town meeting April 4, 1871, of moneys, and paid out up to April 4, 1871, and from April, 1868.

| | |
|---|---|
| Amount of money received by Charles Wheaton, Supervisor, during the year ending March 30, 1868 | $23,345 66 |
| Amount paid out during the same year | 18,962 66 |
| Balance found on hand on settlement with Board of Town Auditors March 30, 1869 | 4,353 00 |
| Amount received during year ending March 29, 1870 | 18,621 94 |
| Amount paid out during same year | 21,604 57 |
| Balance on hand on settlement with Board of Town Auditors March 29, 1870 | 1,370 37 |
| Amount of money received during the year ending March 28, 1871 | 2,937 35 |
| Amount paid out during same year | 1,211 95 |
| Balance found on hand on settlement with Board of Town Auditors March 28, 1871 | 3,095 77 |

| | |
|---|---|
| Amount of town orders allowed by Town Board March 28, 1871 | 597 20 |
| Balance for town expresses the coming year now on hand | 2,498 57 |

Respectfully submitted,

CHARLES WHEATON,
*Supervisor.*

EXHIBIT "B."

18 Town of Aurora in account with Charles Wheaton, Supervisor.

| | |
|---|---|
| 1871, March 28. Amount found to be on hand at this date on settlement with Town Boards | $3,095 77 |
| March 30. Rec'd delinquent tax of County Treasurer | 128 73 |
| | $3,224 50 |
| 1872, March 26. Amount of town orders paid during the year | 1,629 60 |
| March 26. Amount of general fund on hand to date | $1,594 90 |
| March 28. Rec'd of Town Collector special town tax to pay principal on bonds issued to Fox River Valley Railroad | 6,591 12 |
| March 28. Entire amount on hand on settlement with Town Board | 8,114 02 |
| 1872, April 1. Paid town orders to date since settlement with Town Board | 221 25 |
| | $7,892 77 |
| That is, of the general fund there is in my hands now $1,373.65, with which to pay the bills to be audited at the next meeting of the Town Board; of the special town funds for the payment of the bonds there is now in my hands | 6,519 12 |

Which I received March 23, 1872.

Respectfully presented,

CHARLES WHEATON, *Supervisor.*

EXHIBIT "C."

To the Board of Town Auditors of the town of Aurora, in the County of Kane and State of Illinois:

The annual account of the commissioners of Highways of Aurora for the year ending the 1st day of April, A. D. 1872, showeth as follows, to wit:

1st. The labor assessed in said town during the year ending on the 1st day of April, A. D. 1872, is 558 19 days, and the amount of said labor actually performed is 505 days, as appears from the returns made to us by several overseers of highways in said term.

2d. We have received for fines and commutations, and from other sources under the statutes relative to highways, the sums of $56\frac{2}{100}$ dollars as follows, to wit:

| | |
|---|---|
| For fines | $17 20 |
| Old material sold | 30 09 |
| On settlement with overseers | 8 73 |

3d The improvements necessary to be made on the roads and bridges in said town are as follows: Damages for extending Liberty street to Warrenville road, and we estimate the probable expense of making such improvements beyond what the labor to be assessed in this year and the road tax will accomplish, at $230.

4th. The expenses and damages in consequence of laying out, altering, or discontinuing roads during the year last past to —— —— dollars the year is we have received, and from all sources up to this date, the sum of $445,475, which has been paid out and expended as follows, viz: For work on roads and culverts, $214.75; expenses across bridges across Fox river, $72\frac{2}{100}$; painting Aurora bridges, two coats, $100; signs on bridges, $20; delinquent tax paid to districts, $79\frac{64}{100}$; arch over Stalph's race, $2,202\frac{10}{100}$; road scrapers, $24\frac{50}{100}$; stone in districts, $98\frac{98}{100}$; lumber and nails furnished district, $88\frac{34}{100}$; justice's fees, post-
20 age stamp on bonds, $7; taxes, $3,007\frac{54}{100}$; cash on hand, $1,447\frac{21}{100}$.

Given under our hands this 1st day of April, A. D. 1872.

H. B. DOUGLAS,
D. G. LAKE,
O. N. SHEDD,
} *Commissioners of Highways.*

21 EXHIBIT "D."

TOWN OF AURORA.—ILLEGAL TAXES.

| Names of Tax Payers. | Road and Bridge Tax. | Special Town Tax. | Registered Bond Tax. | City Tax. | General Town Tax. |
|---|---|---|---|---|---|
| Jeremiah Goodwin ..... | $13 28 | $19 70 | $26 96 | $64 20 | $2 15 |
| Anton Loser..... | 7 95 | 11 78 | 16 13 | 38 40 | 1 30 |
| Adam Oxenslager..... | 6 85 | 10 17 | 13 92 | 33 09 | 1 12 |
| Geo. W. Daily..... | 2 14 | 3 17 | 4 33 | 10 31 | 35 |
| E. D. Bradley ..... | 2 52 | 3 74 | 5 13 | 12 20 | 42 |
| William A. Tanner..... | 34 46 | 51 12 | 69 98 | 80 97 | 7 28 |
| Wm. A. Tanner & Son.. | 5 44 | 8 07 | 11 05 | 26 31 | 88 |
| Robert Johnson..... | 4 47 | 6 64 | 9 18 | 21 59 | 74 |
| Calcott Stowell ..... | 1 83 | 2 71 | 3 71 | 8 81 | 30 |
| J. D. Dunning..... | 22 45 | 35 31 | 45 64 | 108 58 | 3 66 |
| George M. Hadden..... | 19 44 | 28 82 | 39 47 | 88 95 | 3 17 |
| Loren Gillett ..... | 10 58 | 15 68 | 21 48 | 2 28 | 1 72 |
| Simeon Van Alstine.... | 5 07 | 7 44 | 10 18 | ..... | 82 |
| C. Furman ..... | 4 14 | 6 14 | 8 40 | 20 00 | 67 |
| Wm. W. Bishop ..... | 20 24 | 38 93 | 53 38 | 60 16 | 9 27 |
| H. N. Goodrich..l..... | 10 08 | 14 95 | 20 46 | 48 69 | 1 65 |
| B. Street ..... | 9 19 | 13 73 | 18 68 | 32 85 | 1 42 |
| | | | $351 91 | | |

EXHIBIT "A."

UNITED STATES OF AMERICA, }
*State of Illinois*, }

I, Edward Rummel, Secretary of State of Illinois, do hereby certify that I am the custodian of the original journals of proceedings of the Senate and House of Representatives, of the twentieth general assembly of said State, at their regular session, begun and held at the City of Springfield, January 5th, 1857. That said journals now remain in my office, and that upon the examination of the same, I find the following proceedings in relation to "an act authorizing certain cities, counties, incorporated towns or townships to subscribe to the stock of certain railroads, to wit:

In the House of Representatives, on the 27th day of January, 1857, Mr. Crothers introduced a bill for "an act authorizing certain cities, counties, incorporated towns or townships to subscribe to the stock of certain railroads," which was read a first time and ordered a second reading.

On motion of Mr. Crothers, the rule wa ssuspended;
23 the bill read a 2d time by its title, referred to the Committee on Internal Improvements.

And afterwards, to wit: on the 4th day of February, 1857, in said House of Representatives, the following proceedings appear and are entered upon said House journals to wit:

Mr. Sparks, from the same committee to which was referred House bill for "An act to authorize certain cities, counties, incorporated towns or townships, to subscribe to the stock of certain railroads," reported the same back without amendment and recommended its passage.

"Ordered to a third reading."

And afterwards, to wit: on the 14th day of February, 1857, the following proceedings of said House of Representatives were had, as appeared from, and are entered upon, said House journal, to wit:

House bill for an act authorizing certain cities, counties, incorporated towns or townships to subscribe to the stock of certain railroads, was taken up, read a third time, and the question being shall the bill pass?

It was decided in the affirmative: Yeas, 54; nays, 0.

Those voting in the affirmative are: Arnold, Bane, Blodes, Boal, Burbanke, Dyckes, Epler, Erwin, Eustice, Frisbie, Gilbert, Goudy, Gregons, Grimes, Hill, Huitt, Ingersoll, Burke, Casey, Janett, Jones, Kelsey, Keiby,
24 Lathrop, Lawrence, Little, Logan, Mason, Mequedy, Morgan, Mones, Parker, Christy, Church, Connelly, Crothers, Cullom, Davis, of Vermillion, Denio, Daugherty, Pinckney, Reading, Shallenberger, Sloane, Smith, Stipp, Trail, Tyner, Watt, Wheeler, Welkins, Wyche, Mr. Speaker.

Ordered that the title be as aforesaid, and that the clerk inform the Senate thereof and ask their concurrence therein.

And afterwards, to wit: on the 14th day of February, 1857, the following proceedings were had in the Senate of

the State of Illinois and entered on the Senate journal, to wit:

"A message from the House of Representatives by Mr. Boal, a member."

Mr. PRESIDENT: I am directed to inform [to inform] the Senate that the House of Representatives have passed bills of the following titles, to wit:

* * * * * *

"A bill for an act authorizing certain cities, counties, incorporated towns or townships, to subscribe to the stock of certain railroads."

And afterwards, to wit: on the 16th day of February, 1857, the following proceedings were had in the Senate, of the State of Illinois, and entered upon the journal of said Senate, to wit:

House bill for "An authorizing certain cities, incorporated towns, counties, or townships, to subscribe to the stock of certain railroads, coming up, was read a first time and ordered to a second reading.

25 On motion of Mr. Fuller, the rule was suspended, the bill read a second time by its title and referred to the Committee on Banks and Corporations.

And afterwards, to wit: on the 17th day of February, 1857, in the House of Representatives, of the State of Illinois, the following proceedings were had and entered in the journal of said House of Representatives, to wit:

Mr. Goudy,, from the Committee on Engrossed and Enrolled bills, reported as correctly, enrolled bills of the following titles, to wit:

* * * * * *

An act authorizing certain cities, counties, incorporated towns or townships, to subscribe to the stock of certain railroads.

And afterwards, to wit, on the 18th day of February, 1857, in said House of Representatives, the following proceedings were had and entered in the journal of said House of Representatives, to wit:

A message from the Governor by Benjamin F. Johnson, Private Secretary.

"Mr. Speaker: I am directed by the Governor to inform the House of Representatives that he has approved and signed bills of the following titles, to wit:

* * * * * * *

"An act authorizing certain cities, counties, incorporated towns and townships to subscribe to the stock of certain rail roads."

Which are all the entries of proceedings had in
26 regard to said bill for said act entered upon said journals, or either of them.

And I further certify that it does not appear from said Senate Journal that said bill for an act authorizing certain cities, counties, incorporated towns, or townships, to subscribe to the stock of certain railroads was read on three different days in said Senate, nor does it appear from said Senate journal that on the final passage of said bill in said Senate the ayes and noes were entered in said Senate journal; nor does it appear from said Senate journal that the rule requiring all bills to be read on three different days was suspended in said Senate; nor does it appear from either of said journals that a majority of all the members-elect of both Houses concurred in the passage of said bill.

In testimony whereof I have hereunto set my hand and affixed the Great Seal of State. Done at the city of Springfield this 17th day of October, A. D., 1872, and of the Independence of the United States the ninety-seventh.

[SEAL.] (Signed,) EDWARD RUMMEL,
*Secretary* [illegible]*te.*

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To the Clerk of the Circuit Court of ~~Kane~~ .

27 Let an injunction issue restraining Martin Mi[illegible], from in any way collecting the taxes set opposite the complainants' names in Exhibit D, in the column headed Registered Bond Tax in said exhibit, and none other, upon complainant giving a bond, as required by law, in the penal sum of $1,000, with Wm. A. Tanner, W. W. Bishop, George W. Hadden, as security.

S. WILCOX,
*Judge.*

March 13.

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And also, to wit, on the 6th day of May, 1873, the
28 same being one of the days of the May Term, 1873, of the said Court, an answer was filed in said court in the words and figures following, to wit (which answer, by order of court, was filed as of March 8th, 1873):

STATE OF ILLINOIS, } ss. *In the Circuit Court.*
*Kane County,* } *To the February Term*, 1873.

The answer of Martin B. Miller, defendant to the bill of complaint of E. D. Bradley, George M. Hadden, J. D. Dunning, J. Goodwin, Wm. A. Tanner, W. A. Tanner & Son, Henry Tanner, partner, &c., B. Street, G. W. Daily, H. N. Goodrich, Anton Loser, C. Stowell, A. Ochsenschlager, Loren Gillett, S. Van Alstine, C. Furman, Robert Johnson, and W. W. Bishop, complainants.

This defendant now and at all times hereafter, saving and reserving to himself all and all manner of benefit or advantage of exceptions, or otherwise, that can or may be had or taken, to the many errors, uncertainties, and imperfections in the said bill contained, for answer thereto, or to so much thereof as this defendant is advised it is material or necessary for him to make answer unto, answering, says that he admits that said complainants are residents of the Town of Aurora, and as such, are liable to pay the taxes assessed against them by the proper authorities.

And this defendant further answering, says he does
29 not know, and therefore cannot state, whether the various sums set opposite the respective names of said complainant are correct or not, and therefore neither admits or denies the same, but calls for strict proof on that question.

And this defendant denies that there is now in the hands of the supervisor of said town of Aurora, for general town purposes, any such sum as $1,373.65, but, on the contrary thereof, there is now in his hands about the sum of $160—as will appear from his affidavit, presented herewith, and asked to be taken as part of his answer; and this defendant further states that the annual general expenses of the town of Aurora is from $1,000 to $1,200—and the raising of said $1,000 for general town purposes, after deducting the costs of collecting, and the amount that will remain uncollected will be no more than sufficient to pay the actual

expenses of said town for the year ending March, A. D. 1874; and it always having been the policy of the town to have money enough on hand to pay its debts as they accrue, this defendant does not see how this court can in any way interfere to prevent them from pursuing so just and equitable a course.

And this defendant, further answering, says that, while it is true that the board of supervisors of said Kane County caused to be levied on the taxable property of
30 said town of Aurora the sum of $7,000, and it is also further true that the board of town auditors for said town never audited the same, and this for the reason that the law gives them no power, jurisdiction, or authority in the matter, the law in force July 1st, 1872, expressly providing how and by whom such tax shall be levied; and this defendant says that all the provisions of said law have been fully complied with in all respects. That the commissioners of highways of said town of Aurora were the sole and only judges of the necessity for raising said $7,000 tax, and from their decision there can be no appeal, as defendant is advised.

And defendant, further answering, says that there is now in the hands of the treasurer of the commissioners of highways not one cent of the taxes collected for A. D. 1871, as will more fully appear from the affidavit of the treasurer of said commissioners of highways for said town of Aurora; and defendant says that, in his judgment, the commissioners of highways of said town are fully competent to determine the wants, needs, and necessities of the said road and bridge fund for said town as could possibly be any court of equity, and he respectfully asks that the exhibits and affidavits filed with this answer on this question may be taken as a part hereof.

And this defendant, further answering, says, as to
31 that part of the bill of complaint which alleges that the collector's warrant was delivered to this defendant and again returned to the county clerk, that if the collector's book, as it now is, is just, true, and accurate, and the several amounts of taxes levied against the said complainants are just, true, and accurate, and in accordance with law, it can make no difference to the said complainants; and defendant is informed and believes that the collector's warrant, now in his possession, is just and correct,

and, as defendant is informed and believes, the county clerk, in making out the collector's warrant, or in extending the tax on the assessment-roll, made some few clerical errors (the correction of which did not unjustly affect the complainants, or either of them), which the county clerk very properly corrected, in accordance with the facts and the law, before this defendant entered upon the performance of his duty as such town collector.

And defendant says that, as advised by counsel, the collector's warrant is, and ought to be, a true copy of the assessment-roll, with the proper legal taxes extended thereon, in conformity to law, and that the warrant, by virtue of which he proposes to collect the taxes due from the complainant, is thus made and is legal—valid, and in all respects regular on its face.

32 This defendant does not know, and therefore can not state, whether or not the various schedules attached to complainants' bill of complaint are true and accurate copies of the original, as they purport to be, but calls for proof of the same, and does not desire to be bound by such copies so-called.

This defendant, further answering, says that the city-tax in and for the city of Aurora, and extended in his book as collector, was levied in exact conformity to the existing law, as he is informed by counsel. That Section 122 of the revenue act of A. D. 1872 reads: "The proper authorities of towns, townships, districts, incorporated cities, towns and villages, shall annually, on or before the second Tuesday in August, certify to the county clerk the several amounts which they require to be raised by taxation."

That in conformity to the provisions of said law, the constituted authorities of the said city of Aurora did certify to the county clerk the amount they required to be raised by taxation, and that thereupon the county clerk, as the law requires, and in exact conformity to all of its provisions, as well as conformable to the provisions of the city charter, did extend the said city tax on the assessment roll made by the town assessor; but defendant says that all the amount of money, or at the rate

33 per cent. that can be raised on the taxable property within the city of Aurora, is one and ½ per cent. on the assessed valuation thereof. And to this extent and no further did the county clerk extend a city tax for the city

of Aurora on the said collector's book, as will be seen by computation or by an inspection of the collector's books.

And defendant says, if it had been lawful for the common council to have levied taxes upon valuation of the property of complainants within the city of Aurora, as fixed by the city assessor, their city taxes would have been about double the amount they are now called upon to pay.

And defendant, further answering, says that the statement made in complainants' bill of complaint, that some lands and farms lie partly in and partly out of the city, may or may not be true, defendant not knowing, and therefore neither admits or denies the same; but defendant insists that if there is any such case, it is not specifically pointed out; and if there is such a case, it is a matter that does not concern them, unless they are all thus situated; and there being no allegation to the extent that any one or all of these complainants are thus aggrieved, this defendant asks to have that portion of said bill treated as though he had demurred specially and generally thereto in due form.

34 And this defendant, further answering, says that as he is advised by counsel that the county clerk, in extending the tax for city purposes in the city of Aurora, is not in any way or manner controlled by the charter of the city of Aurora as to the per cent. that he can legally extend on the assessment roll for city purposes, as the law expressly authorizes him to levy such sums as the city authorities may require, and the only limitation as to the amount he can extend is the one prescribed by the constitution.

And this respondent, further answering, as so much and such parts [*of*] of complainant's bill of complaint as relates to the taxes to pay interest upon the bonds issued as payment for the stock subscribed for in the Ottawa, Oswego and Fox River Valley Railroad Company and the Chicago and Iowa Railroad, and ten thousand dollars of the principal due on the bonds issued to pay stock subscriptions to the Ottawa, Oswego and Fox River Valley Railroad, answering, says that on the 18 day of February, 1857, the legislature of the State of Illinois passed, and the governor approved, an act of the following title, to wit: "An act authorizing certain cities, counties, incorporated towns and townships to subscribe to the stock of certain railroads." A duly certified

copy of which is hereunto attached and marked schedule one (1).

35 That after the passage and approval of said act the same was published in and among the laws of the State of Illinois by authority of law and in the printed statutes of said State, which, until overthrown by proof, are strong and conclusive proof of the passage and approval of said act, and that the same was the law of the land, which fact is substantially admitted by complainants' said bill of complaint. But complainant insists that the original journal of the State Senate of the session at which said act was passed, does not show, among other things, that it was read a third time in the Senate, and that it passed by yeas and nays.

In reply to such allegation of said complainant's bill of complaint, this respondent denies that there is any original journal of the Senate's proceedings, and that the certificate of the Secretary of State, a copy of which is attached to complainant's bill of complaint, is untrue; and in support of such denial this respondent asks that the following papers hereto attached and marked Schedule "A" may be taken as part and parcel of this, your respondent's answer, which documents, marked Schedule "A," are as follows, to wit: The affidavit of Thomas C. Jewell, Edward Rummell and the certificate of George H. Harlow, the present Secretary of State.

36 And this respondent avers that said act (a duly certified copy of which is hereto attached, marked schedule one (1) and made a part of this answer) was, in all respects, passed in accordance with the requirements of the constitution of the State of Illinois; and respondent denies that the original journal of said Senate fails to show that all and each of such requirements were observed, and specially that said journal fails to show that said act was read three times, as said constitution requires, or that a majority of the members of said Senate concurred in the passage of said bill, or that the ayes and nays were called on said final passage, and duly entered on the journal of said Senate.

But this respondent further avers that the original journal of said Senate is not now, and has not for many years, been in the office or custody of the Secretary of State of the State of Illinois, as the law requires, but has been

ever since, a short time after the close of said session of A. D. 1857, mislaid and lost.

And this respondent further says that there has not been, since the time last mentioned, any original journal of the Senate of said session from which the said secretary could make a certificate which should set forth the con-
37 tents of said original journal, or any portion of the same; that the pretended certificate attached to complainant's bill, purporting to be signed by the Secretary of State, and to set forth all the proceedings of said Senate, with reference to said bill, is not a certificate taken from the original journal of said Senate, nor does it set forth the contents of said original journal nor any part thereof, nor are said pretended entries a true copy of said original journal, nor any part of the same; nor were the pretended entries contained in said pretended certificate, or any of them, taken from the original journal of said Senate; and the averment in said certificate that the same are copies of the original journal of said Senate is not true.

And this respondent further avers that the said pretended certificate, and the said pretended copies of said entries contained therein, are wholly untrue and void, and should not be received as evidence by this court, nor given any weight whatsoever to overthrow a valid, published and established law of the State of Illinois, which has stood unimpeached for 16 years, and under which rights have accrued, and upon the maintenance of which interests of great value depend.

And this respondent further answering, says that by the laws of Illinois, on the 26th day of February, A. D.,
38 1869, under and by virtue of said law, an election or town meeting was held in the town of Aurora, in the county of Kane, which election was had and held in conformity with the provisions of said law, entered as follows: "An act authorizing certain cities, incorporated towns and townships, to subscribe for stock in certain rail roads.

That the manner of calling said election was in strict conformity to said law; that the election was held in conformity therewith, and the result properly declared in conformity with said law; a copy of all the proceedings of said election is hereto attached and marked Schedule "B," which this respondent asks may be taken as a part of this,

his answer, said copies being duly certified by the town clerk of said town. And this respondent further answering, says that on the 27th day of March, A. D., 1869, another act was passed by the legislature of the State of Illinois, of the following title: An act to amend an act to incorporate the Ottawa, Oswego and Fox River Valley Railroad Company.

And this respondent further insists that even if there were any defect in the passage of said act of A. D., 1857, whereby said act was invalid (which this respon-
39 dent expressly denies,) yet such defect was cured, and said act rendered wholly valid and in full force and effect by the passage of an act entitled, "An act to amend an act authorizing certain cities, counties, towns and townships to subscribe to the stock of certain railroads, which was duly passed by the legislature of the State of Illinois, at the regular session thereof, held in the year A. D., 1869, and which became a law on the 20th day of April, A. D., 1869, which said act is published among the private laws of said session in vol. 3, on page 362 thereof; and this respondent hereby makes said act so published, by reference, a part of this his answer.

To which they beg leave to refer, and that said act of the legislature last-named may be taken as a part and parcel of this his answer to complainants' bill of complaint. That after the passage of the act last named and the act first named, and the legal voters had voted to subscribe sixty thousand dollars to the capital stock of the Ottawa, Oswego and Fox River Valley Railroad, the terms, conditions, and stipulations by the voters of said town having been complied with, on the first day of May, A. D., 1869, the town of Aurora subscribed sixty thousand dollars to the capital stock of said Railroad Company, and
40 sixty thousand dollars of the bonds of said town of Aurora were issued to said railroad company, and six hundred shares of the stock of said company were delivered to said town, and the town of Aurora became the owner of so much stock in said railroad company, the details of which transaction are fully detailed in the affidavit of Wm. H. Miller, hereunto attached, and marked "Schedule C," which this respondent asks may be taken as a part of this his answer. That after the issuing of said bonds the same were put upon the market by the said

railroad company as its agents, and the same were sold in good faith for full value, without any knowledge or notice of any defect or irregularity in the same, as will more fully appear by said affidavit of Wm. H. Miller, marked Schedule "C," above referred to. That since the issuing of said bonds the interest on the same has been promptly and regularly paid by said town, and ten thousand dollars of the principal of the same has been paid by said town; and the town of Aurora, by its officers and servants, has voted at the annual meetings for the election of directors for said railroad company.

And for the legislature to pass a law, the Governor to approve of the same, to have the same published as
41 the law of the State of Illinois, and make it evidence to be received in all courts and places, for the majority of the legal voters of the town of Aurora to vote to subscribe to the same, as above set forth, issue bonds and receive stock in payment thereof; pay interest on the bonds; pay part of the principal; vote the stock, and after innocent parties, in good faith, without any knowledge, notice or suspicion of any defect or irregularity therein, would be a fraud so monstrous in its proportions and effect as not to be tolerated or submitted to among honest men.

And this respondent further answering, says that all of said bonds have been duly registered in the auditor's office at Springfield. A copy of said bonds, together with the auditor's certificate showing the amount and number of said bonds; the affidavit of the supervisor, and all things shown in the auditor's office, is hereunto attached and marked Schedule "D," which this respondent asks may be taken as a part and parcel of this respondent's answer, by which the court will see that every act or thing requisite and necessary to make such bonds a legal obligation have been complied with. And this respondent further answering says that under the law of 1869, under which said
42 bonds were registered, being an act entitled an act, entitled an act to fund and provide paying the railroad debts of counties, townships, cities and towns, in force April 16, 1869.

The tax for five thousand dollars to pay interest on the bonds still unpaid, to wit, fifty thousand dollars, was levied and assessed under and by virtue of said act last above-referred to. That the amount of ten thousand dollars to

pay two thousand dollars, the principal of bonds due the current year, were levied as a special town tax, under authority of the action of the town board of the town of Aurora, a copy of which proceedings are hereunto attached and marked Schedule "E," which this respondent asks may be taken as a part and parcel of this his answer.

And this respondent insists that all proceedings in relation to levying, assessing, and collecting said two sums, to wit, five thousand dollars to pay annual interest, and ten thousand dollars of principal, are legal, regular and in strict conformity to law.

And this respondent further answering says, that so far as relates to the question of whether or not the said railroad has been sold out he does dot know, and therefore cannot state, and insists that it is an utterly trivial question.

43 The town bought the stock and paid for it in its negotiable bonds. These bonds have been sold to innocent parties, in good faith, and for full value in money, and the question of whether or not the town made a good trade or bad trade, whether the agents of the railroad company have acted properly or improperly, selling, leasing or otherwise acting properly or improperly with said railroad are controversies between said town and said railroad company or its officers, and have nothing to do with the town and its creditors, who, in good faith, without any knowledge, notice or suspicion, have purchased said bonds.

And this respondent further answering says, that under and by virtue of the law of 1869, the said town has a drawback now amounting to a large sum, as appears by the cirtificate of the auditor hereunto attached, and which sum, in the period of ten years, will amount, as he verily believes, to nearly half of said sixty thousand dollars of capital stock subscribed to said railroad company; and while it is unnecessary to say anything in relation to the value of said stock owned and held by said town, in said Railroad Company, yet this respondent believes such stock is and will be good and valuable property, and will shortly pay a dividend,

44 and every dollar of the bonds issued by said town with interest thereon will finally have to be paid, and if the payment is postponed and the rights and benefits of the law of 1869 are postponed, the only effect will be to deprive the town of the benefits under the law of 1869, to bring the reproach of dishonesty and repudiation

upon the town. The road has been built, and was built in the time and manner pointed out and printed in the notice upon which the voters voted; and this respondent insists that a majority of the legal voters voted to subscribe, as will fully appear by the certificate of the town clerk hereto attached; and this respondent denies that to make the bonds bear ten per cent. interest and to fix the time of payment, was in violation of law, but affirms that it was in strict conformity with the law, and that said bonds were a legal and binding obligation on said town; and that the tax levied, and by this respondent about to be collected, is legal and regular, and this respondent has not compared the amounts to be collected of complainants for the payment of said bonds and interest thereon, specifically with his collector's books, but believes the same are correctly stated in complainants' bill of complaint; but should there be any error in that regard he does not wish to be barred thereby.

45 And this respondent further answering says, as to the allegations in relation to stock voted and bonds issued in aid of the construction of the Chicago and Iowa Railroad Company, this respondent has attached hereto certified copies of all the proceeding appertaining to the calling of said special town meeting, and marked schedule "T," which he asks may be taken as a part and parcel of this, his answer. The complainants allege that the rate of interest said bonds should bear and the time of payment thereof was not specified, which allegation is absolutely false, as will fully appear by the copies from the records of the town clerk of the town of Aurora, hereto attached, and above referred to as schedule F, and said allegation was recklessly made and is utterly false and untrue. It is also alleged that a majority of the legal voters of said town did not vote for such subscription, which allegation is equally false and untrue, as will also appear by said certificate of the town clerk of the town of Aurora hereunto attached and marked schedule "F." And this respondent insists that said town meeting to vote to purchase one hundred thousand dollars of stock of the Chicago and Iowa Railroad Company and issue bonds therefor, was had and held in strict conformity to

46 law; that the election or town meeting was properly called; a large majority of the legal voters at that election voted for said subscription. That after such voting the road was built in accordance with the terms and condi-

tions of the subscription, and one thousand shares of stock of the Chicago and Iowa Railroad Company, was delivered to said town, and the bonds of said town to the extent of one hundred thousand dollars was delivered to said Railroad Company. That said bonds were sold for full value to innocent parties without knowledge, notice, or suspicion of any defect, fault, irregularity therein, as will fully appear by the affidavit of Wm. H. Miller hereunto attached and marked schedule "G." and made part of this answer. That said bonds were duly registered in the auditor's office, as will appear by the certificate of the Auditor hereunto attached, and marked schedule "H," and made part of this, his answer. And in all respects every provisions of law have been fully complied with.

And this defendant submits to this honorable Court that all and every of the matters in said complainant's bill mentioned and complained of, are matters which may be tried and determined at law, and with respect to which
47 the said complainants are not entitled to any relief from a court of equity; and this defendant hopes he shall have the same benefit as if he had demurred to the bill of said complainant.

And this defendant further answering, denies that the statements in said bill of complaint are true, but on the contrary says, as he is informed by counsel and believes, they are untrue and not honestly stated, and defendant is ready to aver, maintain and prove this, his answer, in such manner as this honorable court shall direct, and he humbly prays to be hence dismissed with his reasonable costs and charges in that behalf most wrongfully sustained.

PARKS & MCDALE, M. B. MILLER.
*Sol's for Defndt.*

Martin B. Miller, being first duly sworn on oath, states that he has heard read the foregoing answer by him signed, and knows the contents thereof, and that the same and the matters and things therein stated are true of his own knowledge, except those matters stated upon information and belief or the advice of counsel, and as to those
48 matters he verily believes them to be true.

M. B. MILLER.

Subscribed and sworn to before me this 7th day of March, A. D. 1873.

[Notarial Seal.] A. C. LITTLE, *N. P.*

"SCHEDULE I."

An act authorizing certain cities, counties, incorporated towns, and townships to subscribe to the stock of certain railroads.

SEC. 1. Be it enacted by the people of the State of Illinois, represented in the General Assembly, that any city, county, incorporated town, or any township now or hereafter organized under the township organization laws which may be situated on or near the route of the Ottawa, Oswego, and Fox River Railroad, or of the Chicago, Amboy, and Upper Mississippi Railroad, or of Joliet and Mendota Division of the Joliet and Terra Haute Railroad as the same may have heretofore, or may hereafter, be surveyed and located, may become subscribers to the stock of any such road, and may issue bonds for the amount of such stock so subscribed, with coupons for interest thereto attached, under such limitations and restrictions, and on such conditions as as they may choose, and the directors of said company may approve; the proposition for said subscription having been first submitted to the inhabitants of such city, town, county, or township, and approved by them, and, upon application of any fifty voters of any city, county, incorporated town, or township as aforesaid, specifying the amount to be subscribed and the conditions of said subscription, it shall be the duty of the clerk of such city, town, county, or township immediately to call an election in the same manner that other elections for said city, county, town, or township are called for the purpose of determining whether said city, county, township, or town will subscribe to the stock of said road, and if a majority of said votes shall be "for subscription," then the County Court or Board of Supervisors having jurisdiction over county matters in said county, or the corporate authorities of said city or town, or the supervisors and town clerk of such township so voting shall cause such subscription to be made, and upon its acceptance by the directors of said company, shall cause bonds to be issued in conformity with said vote, which bonds shall in no case bear a higher rate of interest than ten per cent. per annum, and shall not be of less denomination than one thousand dollars, and shall be accepted by said company at par value.

Originated in the House of Representatives.
C. LEIB, *Clerk.*

SEC. 2. Any township in Kendall County, and the township of Plainfield, in Will County, shall have like power to subscribe for the stock of any railroad now or hereafter located through said township, and issue bonds therefor in the same manner as provided in section first; or to vote a sum not exceeding five thousand dollars to pay damages for right of way through said town for any such railroad.

SEC. 3. This act shall be in force from and after its passage, and shall be liberally construed for the purposes expressed therein, and shall be held to be a public act.

SEC. 4. It shall be the duty of the proper authorities of any city, incorporated town, county, or township,
51 issuing bonds as aforesaid, to make all necessary arrangements and provide for the prompt payment of all interest and other liabilities accruing thereon, and to levy such taxes as may be necessary therefor, as other taxes are levied by them.

SAMUEL HOLMES,
*Speaker of the House of Representatives.*

JOHN MOORE,
*Speaker of the Senate.*

Approved February 18, 1857.

WILLIAM H. BISSELL.

UNITED STATES OF AMERICA, }
*State of Illinois.* } *ss.* *Office of Secretary.*

I, George H. Harlow, Secretary of the State of Illinois, do hereby certify that the foregoing is a true copy of an enrolled law, entitled an act authorizing certain cities, counties, incorporated towns, and townships to subscribe to the stock of certain railroads now on file in this office. In witness thereof, I hereto set my hand and affix the great seal of State, at the city of Springfield, this 25th day of February, A. D. 1873.

[Illinois State Seal.]

GEO. H. HARLOW,
*Secretary of State.*

"SCHEDULE A,"

STATE OF ILLINOIS, }
*Sangamon County.* } *ss.*

52 Thomas C. Jewell, being first duly sworn, on oath doth depose and say that on the seventeenth day of October, A. D., 1872, he was chief clerk in the office of the Secretary of State of Illinois; that upon that date he made a certificate in the name of Edward Rummel, then Secretary of State, in words and form about as follows:

UNITED STATES OF AMERICA, }
*State of Illinois.* } *ss.*

I, Edward Rummel, Secretary of State of the State of Illinois, do hereby certify that I am the custodian of the original journals of proceedings of the Senate and House of Representatives of the twentieth General Assembly of said State, at their regular session begun and held at the city of Springfield January 5, 1857; that said journals now remain in my office, and that upon the examination of the same I find the following proceeding in relation to "an act authorizing certain cities, counties, incorporated towns and townships to subscribe to the capital stock of certain railroads," to wit:

53 In the House of Representatives, on the 27th day January, A. D., 1857, Mr. Corothers introduced a bill for "an act authorizing certain cities, counties, incorporated towns and townships to subscribe to the capital stock of certain railroads," which was read a first time and ordered to a second reading.

On motion of Mr. Corothers, the rule was suspended, the bill read a second time by its title, and referred to the committee on Internal Improvements.

And afterwards, to wit, on the 4th day of February, A. D., 1857, in said House of Representatives, the following proceedings appear, and are entered upon said House journals, to wit:

Mr. Sparks, from the same committee to which was referred House bill for "an act to authorize certain cities, counties, incorporated towns or townships to the stock of certain railroads," reported the same back without amendment, and recommended its passage.

Ordered to a third reading.

And afterwards, to wit, on the 14th day of February, A. D., 1857, the following proceedings of said House of Representatives were had, as appears from, and are
54 entered upon, said House journal, to wit:

House bill for "an act authorizing certain cities, counties, incorporated towns or townships to subscribe to the stock of certain railroads," was taken up, read a third time, and

The question being, "Shall the bill pass?"

It was decided in the affirmitive: yeas, 54; nays, 00.

Those voting in the affirmative are:

(Here follows the names of members voting.)

Ordered that the title be as aforesaid, and that the clerk inform the Senate thereof and ask their concurrence therein.

And afterwards, to wit, on the 14th day of February, A. D., 1857, the following proceedings were had in the Senate: A message from the House of Representatives, by Mr. Boal, a member:

Mr. Speaker: I am directed to inform the Senate that the House of Representatives have passed bills of the following title, viz:

* * * * * *

A bill for "an act to authorize certain cities, counties, incorporated towns or townships to subscribe to the stock of certain railroads."

* * * * * *

55 In the passage of which I am instructed to ask the concurrence of the Senate.

And afterwards, to wit, on the 16th day of February, A. D. 1857, the following proceedings were had in the Senate of the State of Illinois, and entered upon the journal of said Senate to wit:

House bill for "an act authorizing certain cities, counties and incorporated towns to subscribe to the stock of certain railroads," coming up, was read a first time and ordered to a second reading.

On motion of Mr. Fuller: The rule was suspended, the bill read a second time by its title, and referred to the committee on Banks and Corporations.

And afterwards, to wit: On the 17th day of February, A. D. 1857, in the House of Representatives of the State of

Illinois, the following proceedings were had and entered on the journal of the said House of Representatives. to wit:

A message from the Senate by Mr. Wyatt, assistant Secretary:

56 Mr. Speaker: I am directed to inform the House of Representatives, that the Senate have concurred with them in the passage of bills of the following titles to wit:

* * * * * *

A bill for an act authorizing certain cities, counties, incorporated towns or townships to subscribe to the stock of certain railroads."

* * * * * *

Mr. Goudy, from the committee on engrossed and enrolled bills, reported as correctly enrolled bills of the following titles, viz:

* * * * * *

"An act authorizing certain cities, counties, incorporated towns and townships to subscribe to the stock of certain railroads."

And afterwards to wit: On the 18th day of February, A. D. 1857 in said House of Representatives, the following proceedings were had and entered upon the journal of said House of Representatives, to wit:

A message from the Governor, by Benjamin F. Johnson, private Secretary:

Mr. Speaker: I am directed by the Governor to inform the House of Representatives that he has approved and signed the following titles, to wit:

* * * * * *

"An act authorizing certain cities, counties, incorpo-
57 rated towns and townships to subscribe to the stock of certain railroads."

Which are all the entries of proceedings had in regard to said bill for said act entered upon said journals or either of them, and I further certify that it does not appear from said Senate journal that the said bill for "An act authorizing certain cities, counties incorporated towns and townships to subscribe to the stock of certain railroads" was read on three different days in said Senate, nor does it appear from said Senate journal that on the final passage of said bill in

said Senate the ayes and noes were entered in said Senate journal; nor does it appear from said Senate journal that the rule requiring all bills to be read on three different days was suspended in said Senate; nor does it appear from either of said journals that a majority of all the members elect of both houses concurred in the passage of said bill.

In testimony whereof I have hereunto set my hand and affixed the great seal of State.

58 Done at the city of Springfield, this seventeenth day of October, A. D. 1872, and of the Independence of the United States the ninety-fifth.

[SEAL OF THE STATE] EDWARD RUMMEL,
Secretary of State.

And the said Thomas C. Jewell further deposes and says that he has been informed and believes that the following words, appearing in the above certificate were omitted in said original certificate to wit:

"And afterwards, to wit: On the 17th day of February "A. D. 1857, in the House of Representatives of the State of "Illinois, the following proceedings were had and entered on "the journal of said House of Representatives, to wit:

"A message from the Senate, by Mr. Wyatt, assistant "Secretary:

"Mr. Speaker: I am directed to inform the House of "Representatives that the Senate have concurred with them "in the passage of bills of the following titles, to wit:

* * * * * *

"A bill for "An act authorizing certain cities, counties, "incorporated towns or townships to subscribe to the stock "of certain railroads."

59 That if the said words were so omitted from said certificate, the said certificate is erroneous in that respect.

And the said Thomas C. Jewell further says that, notwithstanding the said certificate sets forth that the extracts referred to were taken from the original journals, the said copies of the said journals were really transcribed from what is known as the journal record, and not from the original minutes of the said House and Senate journals.

And the said Thomas C. Jewell further states that he has been a clerk in the office of the Secretary of State for a number of years, a portion of the time being chief clerk in said office, and that he is thoroughly conversant with the affairs in and about the said office; that he has on different occasions made diligent and thorough search for the original minutes of the journals of the Twentieth General Assembly, and that he has been unable to find the same; and is informed and verily believes that the said original minutes of said journals have been destroyed.

And the deponent further says that the purpose of making this affidavit is, that the same may be used as evidence in the Circuit Court of Kane County in a certain
60 case wherein Jeremiah Goodwin, Anton Loser, Adam Oxenslager, Erastus D. Bradley, William A. Tanner, and William A. Tanner and Henry Tanner, partners by the name and style of Tanner & Son, Robert Johnson, Calcott Stowell, Josiah D. Dunning, George Hadden, Simeon Van Alstine, B. Street, Cornelius Furman, William W. Bishop, and Horace N. Goodrich are complainants, and Martin Miller, collector of the town of Aurora, is defendant.

THOS. C. JEWELL.

Sworn and subscribed to before me this twenty-sixth day of February, A. D. 1873.

[SEAL.] LOTUS NILES,
*Notary Public.*

STATE OF ILLINOIS, }
*Sangamon County.* } *ss.*

Edward Rummel, being first duly sworn, on oath doth depose and say, that, on the seventeenth day of October, A. D. 1872, he was Secretary of State of the State of Illinois; that he has examined the affidavit, hereto attached, made by Thomas C. Jewell, and that he believes the same to be true; that the certificate therein referred to concerning the action of the Twentieth General Assembly of the State of Illinois, upon and relative to "A bill for an act authorizing certain cities, counties, incorporated towns, and townships to subscribe to the stock of certain railroads," if made, was not made by me in person, but must have

61 been made by said Thomas C. Jewell, as stated in his affidavit.

EDWARD RUMMEL.

Sworn and subscribed to before me this 26th day of February, A. D. 1873.

[SEAL.] LOTUS NILES,
*Notary Public.*

UNITED STATES OF AMERICA,
*State of Illinois.*
OFFICE OF SECRETARY OF STATE.

I, George H. Harlow, Secretary of State of the State of Illinois, do hereby certify that I have examined the affidavits, hereto attached, made by Thomas C. Jewell, and that the "journal records" therein referred to are not, in my judgment, the original journals, as kept by the clerks of the two Houses of the said Twentieth General Assembly, but that they are only transcripts thereof; and that the person making said transcripts might have omitted that portion of the said journal of the Senate of the Twentieth General Assembly relating to or showing the final action of the said Senate upon the bill for "An act authorizing certain cities, counties, incorporated towns, and townships to subscribe to the stock of certain railroads"

Schedule A.

In witness whereof, I hereto set my hand and affix the Great Seal of State, at the city of Springfield, this 26th day of February, A. D. 1873.

[SEAL.] GEO. H. HARLOW,
62 *Secretary of State.*

"SCHEDULE B."

To the Supervisor and Town Clerk of Aurora, in the County of Kane, State of Illinois:

We, the undersigned citizens, legal voters of said town, most respectfully petition you to call a special election, to be held at the usual place of holding town-meetings in said town, on a day to be fixed by you, for the purpose of determining whether said town shall subscribe sixty thousand dollars to the capital stock of the Ottawa, Oswego, and Fox River Valley Railroad, and to issue bonds for that amount

therefor, to aid in building said road, in accordance with the provisions of an act of the Legislature of said State, entitled "An act authorizing certain cities, counties, incorporated towns, and townships to subscribe to the stock of certain railroads" (approved February 18th, 1857.) *Provided*, That the vote be taken on the express condition that no bonds issue, pass, or be delivered to the trustees authorized by said railroad company to receive the same until satisfactory assurances be given to the Supervisor and Town Clerk of said town, and to the following-named citizens of said town, viz.: E. R. Allen, J. G. Stolp, Wm. V. Plum, or a majority of them, that the road will be built.

J. G. Stolp,
F. B. Rice,
L. Z. Baker,
C. W. Young,
Peter Innes,
John Farr,
I. S. Bivier,
J H. Thomson,
A. C. Little,
Wm. M. Hattery,
James Miller,
E. G. Rice,
W. B. Burton,
J. F. Gale,
G. W. Baker,
F. Stringer,
J. B. Jenkins,
H. M. Avery,
D. C. Pratt,
John Rising,
Abner Busshe,
William Vinter,
J. M. Holt,
J. Pierce,
J. D. Pollock,
C. S. Roe,
S. Williams,
J. F. Wiswell,
A. A. Johnson,
Chas. J. Phrangle,
E. Sims,
M. Heldsenhold,
A. D. Wanner,
O. B. Knickerbocker,
A. G. McDale,
O. D. Powell,
Abel C. Rhodes,
E. A. Lyon,
John Plain,
O. S. Clayton,
R. Pierpont,
Benj. Bisbey,
J. S. Hawley,
J. Alshuler,
Leon Hirsh,
S. H. Day,
Oscar Payne,
J. E Forrester,
Charles L. Bangs,
Wm. H. McLallen,
J. E. Calhoun,
John Mahoney,
A. Bauer,
E. R. Allen,
Luther Bradley,
Samuel Hayles,
D. D. Owen,
R. G. Montony,
W. D. Hawkins,
Phillipp Schrikler,

O. N. Shedd,
H. W. Hatch,
J. H Darragh,
Daniel W. Mills,
I. J. Knight,
C. A. Wright,
F. E. Beahra.
Michael Dillon,
J. C. Harrington.

I, W. J. Pollock, town clerk of the Township of Aurora, Kane county, State of Illinois, do hereby certify
64 that the above is a true copy of a paper on file in my office, and that it bears the following endorsements upon its back, to wit: "Application of voters for special town meeting on F. R. V. R. R.

"Filed in the town clerk's office this 13th day of Feb. 1869.

JOHN C. SHERWIN,
*Town Clerk.*"

AURORA, ILL., *Feb. 27., A. D., 1873.*

W. J. POLLOCK,
*Town Clerk.*

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To the supervisor and town clerk of the town of Aurora, in the county of Kane, State of Illinois:

We, the undersigned citizens, legal voters of said town, most respectfully petition you to call a special election, to be held at the usual place of holding town meetings in said town, on a day to be fixed by you, for the purpose of determining whether said town shall subscribe sixty thousand dollars to the capital stock of the Ottawa, Oswego and Fox River Valley Railroad, and to issue bonds for that amount therefor to aid in building said road, in accordance with the provisions of an act of the legislature of said State, entitled "an act authorizing certain cities, counties, incorporated towns and townships to subscribe to the stock of certain railroads" (approved Feb. 18, 1857). *Provided*, That the vote be taken upon the express conditions that no bond issue pass, or be delivered to the trustees authorized
65 by said railroad company to receive the same until satisfactory assurances be given to the supervisor and town clerk of said town and to the following named citizens

of said town, viz: J. G. Sharp, L. D. Brady and Wm. V. Plum, or a majority of them, that the road will be built.

John R. King,
Wm. V. Plum,
Jay Tarble,
R. C. Mix,
E. B. Mix,
A. D. Brummell,
J. W. Phillips,
R. W. Marshall,
Travis Phillips,
H. M. Titus,
John Hall,
Thomas Newton,
J. W. Kinney,
E. D. Kinney,
J. B. Chase,
J. W. Giles,
S. C. Gillett,
A. Loser,
S. B. Hawley,
J. H. Huntington,
M. Ferguson,
Jos. M. Odell,
P. Richardson,
O. Willson,
A. F. Shedd,
E. T. Shedd,
J. C. Hanna,
Geo. R. Wilcox,
" Geo. Hanna,
G. H. Stockwell,
John E. Swain,
N. Wirick,
R. B. Gates,
John C. Sherwin,
R. M. Goodwin,
C. O'Neill,
H. F. Van Nortwick,
C. H. Adams,
A. C. Smith,
Gus. A. Pfrangle,
Wm. Giles,
D. W. Hurd,
M. L. Baxter,
F. W. Kelly,
Wm. Haywood,
Benj. M. Maynard,
C. Turman,
A. Stoker,
Wm. McMicken,
N. C. Simmons,
A. Saterfield,
John Watt,
L. Baldwin,
F. H. Hotz,
Charles Blazy,
J. Hanncock,
Peter Stefen,
Carl Miller,
Wm. M. Titus,
J. D. Ward,
C. H. Morris,
James D. Fox,
M. McFarland,
Eugene Canfield,
R. L. Carter,
C. Hoyt,
E. D. Pinney,
Geo. Wilder,
J. L. Holden,
Geo. S. Bangs,
Theo. L. De Land,
A. H. Stone,
H. Mulberry,
Phillip Jungles,
William Downer,
John W. Marshall,
R. W. Gates.

John Kantenberger,
D. D. Williams,
C. L. Hoyt,
Wm. H. Miller,

I, W. J. Pollock, Town Clerk of the township of Aurora, Kane County, State of Illinois, do hereby certify that the above is a true copy of a paper on file in my office, and that it was folded within another paper of like tenor, bearing the following endorsement, to wit: "Application of voters for special town meeting on F. R. V. R. R. Filed in the town clerk's office this 13th day of Feb., 1869.

"JOHN C. SHERWIN, *Town Clerk.*"

W. J. POLLOCK,
*Town Clerk.*

AURORA, ILLS.,
*Feb. 27th, 1873.*

MINUTES OF PROCEEDINGS OF SPECIAL TOWN MEETING, FEB 26TH, A. D. 1869.

At the special town meeting, held in the town of
67 Aurora, county of Kane, and State of Illinois, at the City Hall, in the city of Aurora, in said town, on the 26th day of February, A. D. 1869. The meeting was called to order by John C. Sherwin, town clerk. Lester W. Gray was, on motion of W. H. Miller, duly chosen to preside as moderator; who, being first duly sworn by J. C. Sherwin, town clerk, entered upon the duties of his office. The polls to decide whether the town of Aurora shall subscribe sixty thousand dollars to the capital stock of the Ottawa, Oswego and Fox River Valley Railroad, and to issue bonds for that amount, to aid in building said road, were opened by proclamation thereof, being first made by the clerk. At twelve o'clock at noon, on motion of J. M. Felton, the meeting was adjourned and polls closed for one hour, till one o'clock P. M. At one o'clock P. M. meeting was called to order by the moderator, and polls opened pursuant to adjournment by the clerk.

The following is a statement of the result of the canvass of the votes by ballot, for the purpose above set forth: at the said special town meeting, held as aforesaid, at the time and place aforesaid, as publicly canvassed by the presiding officer at said meeting.

The whole number of votes cast was sixteen hundred and

fifteen, of which one thousand and fifty were "for subscription," and five hundred and sixty-one were "against subscription;" two votes were destroyed because voted double.

L. W. GRAY,
*Moderator.*

Attest:

JOHN C. SHERWIN,
*Town Clerk.*

68 I, W. J. Pollock, town clerk of the town of Aurora, county of Kane, and State of Illinois, do hereby certify that the foregoing is a correct copy from the records of the town of Aurora of a special town meeting, as therein set forth.

W. J. POLLOCK,
*Town Clerk.*

AURORA, *Feb'y, 1873.*

Register of bonds issued by the town of Aurora, county of Kane, and State of Illinois, as authorized by special town meeting, held February 26th, A. D. 1869, to aid in the construction of the Ottawa, Oswego and Fox River Valley Railroad. Number of bonds issued, sixty. Amount of bonds, $60,000.

| Numbers of Bonds. | Date of Issue. | Date of Bond. | Am't of Each Bond. | Maturity. | Rate of Interest. | Remarks. |
|---|---|---|---|---|---|---|
| 1, 2, 3, 4, 5, 6, 7, 8, 9 10 .... | May 1, 1869. | July 1, 1869. | $1,000 | July 1, 1872. | 10 per cent. | |
| 11, 12, 13, 14, 15, 16, 17, 18, 19, 20 | May 1, 1869. | July 1, 1869. | 1,000 | July 1, 1873. | 10 per cent. | |
| 21, 22, 23, 24, 25, 26, 27, 28, 29, 30 | May 1, 1869. | July 1, 1869. | 1,000 | July 1, 1874. | 10 per cent. | |
| 31, 32, 33, 34, 35, 36, 37, 38, 39, 40 | May 1, 1869. | July 1, 1869. | 1,000 | July 1, 1875. | 10 per cent. | |
| 41, 42, 43, 44, 45, 46, 47, 48, 49, 50 | May 1, 1869. | July 1, 1869. | 1,000 | July 1, 1876. | 10 per cent. | |
| 51, 52, 53, 54, 55, 56, 57, 58, 59, 60 | May 1, 1869. | July 1, 1869. | 1,000 | July 1, 1877. | 10 per cent. | |

"SCHEDULE D,"

69

No. 1. $1,000.

UNITED STATES OF AMERICA.

COPY OF BOND.

STATE OF ILLINOIS.

TEN PER CENT. BOND.

TOWN OF AURORA.

The town of Aurora, in the county of Kane, State of Illinois, acknowledges itself indebted in the sum of one thousand dollars, lawful money of the United States of America, which sum the said town of Aurora promises to pay to the Ottawa, Oswego and Fox River Valley Railroad Company, or to the bearer hereof, at the Fourth National Bank in the city of New York, three years from the first day of July, A. D. 1869, with interest from the first day of July, A. D. 1869, at the rate of ten per cent. per annum, payable annually at said bank upon the presentation and delivery of the several coupons hereto annexed, as they respectfully become due. And to the payment of said principal and interest in the manner aforesaid, the faith and revenue of said town is hereby irrevocably pledged. This bond is one of a series of sixty bonds bearing even date herewith, each for the sum of one thousand dollars, numbered from one to sixty inclusive, and is issued in pursuance of an election or Special Town meeting held in said town on the 26th day of February, A. D. 1869, under and by virtue of a certain act of the legislature of the State of Illinois, approved February 18th, 1857. entitled: "An act authorizing certain cities, counties, incorporated towns and townships,

70 to subscribe to the stock of certain railroads." The said act having special reference to the said Ottawa, Oswego and Fox River Valley Railroad company, at which election or Special Town meeting, a majority of the legal voters participating at the same, voted for subscription to the capital stock of the Ottawa, Oswego and Fox River Valley Railroad company in the sum of $60.000, and to issue the Bonds of said town therefore, and the said election or Special Town meeting was, by the proper authorities, then and there declared duly carried "for subscription," previous application in writing of fifty legal voters of said town for such an election or special town meeting, specifying the amount to be

subscribed and the conditions of such subscription having been made to the clerk of said town, and the said town clerk having called said election or special town meeting in accordance therewith, and having given due notice of the time and place of holding the same as required by law and the act aforesaid. In witness whereof the supervisor and town clerk of said town have hereunto set their hands and seals this first day of May, A. D. 1869.

TOWN CLERK, [SEAL] SUPERVISOR, [SEAL]

I, W. J. Pollock, town clerk of the town of Aurora, County of Kane, and State of Illinois, do hereby certify that the foregoing is a correct transcript from the records of the town of Aurora.

W. J. POLLOCK,
*Town Clerk.*

Aurora, Feby. 1873.

John C. Sherwin being first duly sworn on oath doth depose and say that during the month of February
71 A. D. 1869 he was town clerk of the township of Aurora, County of Kane and State of Illinois. That the special town meeting held on the 26th day of February, A. D. 1869, as shown by the records of said town, to determine whether the said town of Aurora should subscribe the sum of sixty thousand dollars to the capital stock of the Ottawa, Oswego and Fox River Valley Railroad Company, was held pursuant to a call, of which the following is a copy, to wit:

"TOWN MEETING."

"Whereas more than fifty voters of the town of Aurora, "Kane County, Illinois, have, in writing filed in my office, "an application that a special town meeting be called for "the purpose of determining whether said town shall sub- "scribe sixty thousand dollars to the capital stock of the "Ottawa, Oswego and Fox River Valley Railroad, the "inhabitants, legal voters of the said town of Aurora, are "therefore, hereby notified that a special town meeting will "be held at the City Hall in the city of Aurora in said town "on Friday the 26th day of February, A. D. 1869, at nine "o'clock in the forenoon, for the purposes following, to wit: "to determine whether said town shall subscribe sixty

"thousand dollars to the capital stock of the Ottawa, Oswe-
"go and Fox River Valley Railroad, and to issue bonds for
"that amount therefor, to aid in building said railroad in ac-
"cordance with the provisions of an act of the Legislature
" of said State, entitled: "An act authorizing certain
72 "cities, counties, incorporated towns and townships
"to subscribe to the stock of certain railroads"—ap-
"proved Febr'y 18th, 1857. Provided, if the vote be taken
"upon the express condition that no bonds issue, pass, or be
"delivered to the trustees authorized by said railroad com-
"pany to receive the same until satisfactory assurances be
"given to the supervisor and town clerk of said town, and the
"following named citizens of said town, namely: J. G. Stolp,
"L. D. Brady, E. R. Allen, and William V. Plum, or a ma-
"jority of them, that the road will be built, being the objects
"contained in the said application filed in my office.

"Given under my hand at Aurora, this sixteenth day of
"February, A. D. 1869.

JOHN C. SHERWIN,
*Town Clerk.*

And the said John C. Sherwin further says that he posted copies of the said notice in five of the most public places in said town, on the sixteenthday of February, A. D. 1869, being ten days previous to the holding of said town meeting. And that the same was published in the *Aurora Beacon* printed on the 18th day of February A. D. 1869.

Sworn to and subscribed before me this 4th day of March, A. D. 1873.

CARL G. METZNER, *Clerk,*
*Court Common Pleas, of the city of Aurora.*

{ COURT OF COMMON PLEAS SEAL }

73 TOWN MEETING.

*Whereas*, more than fifty voters of the town of Aurora, Kane County, Illinois, have, in writing, filed in my office, an application that a special town meeting be called for the purpose of determining whether said town shall subscribe sixty thousand dollars to the capital stock of the Ottawa, Oswego, and Fox River Valley Railroad, the inhabitants, legal voters of the said town of Aurora,

are, therefore, hereby notified, that a special town meeting will be held at the City Hall, in the City of Aurora, in said town, on Friday, the 26th day of February, A. D., 1869, at 9 o'clock in the forenoon, for the purposes following, to wit: To determine whether said town shall subscribe sixty thousand dollars to the capital stock of the Ottawa, Oswego and Fox River Valley Railroad, and to issue bonds for that amount therefor, to aid in building said railroad in accordance with the provisions of an act of the Legislature of said State, entitled "An act authorizing certain cities, counties, incorporated towns and townships, to subscribe to the stock of certain railroads, approved February 18, 1857, provided, if the vote be taken upon the express condition that no bonds issue, pass, or be delivered to the trustees, autuorized by said railroad company to receive the same, until satisfactory assurances be given to the supervisor and town clerk of said town, and the following named citizens of said town, namely: J. G. Stolp, L. D. Brady, E. R. Allen, and William V. Plum, or a majority of them, that the road will be built, being the objects contained in the said application filed in my office.

74 Given under my hand at Aurora, the sixteenth day of February, A. D., 1869.

JOHN C. SHERWIN,
*Town Clerk.*

STATE OF ILLINOIS, }
*Kane County.* } *ss.*

I, J. H. Hodder, one of the publishers of the Aurora, *Beacon*, a newspaper printed in the city of Aurora, do hereby certify that the foregoing is a correct copy of an advertisement relating to town meeting, which was duly published in every copy and impression of the issue of February 18th, A. D., 1869, of said Aurora *Beacon*.

Given under my hand, this fourth day of March, A. D., 1873.

J. H. HODDER.

"SCHEDULE C."

STATE OF ILLINOIS, } ss. *In the Circuit Court.*
*Kane County.* } *To the Term 1873.*

JEREMIAH GOODWIN, ANTON LOSER, ADAM OXENSLAGER, GEO. W. DAILY, ERASMUS D. BRADLEY, WM. A. TANNER, AND WM. A. TANNER, AND HENRY TANNER, *partners, &c.;* ROBERT JOHNSON, CALCOTT STOWELL, JOSIAH D. DUNNING, GEO. HODDEN, LORAN GILLETT, SIMEON VAN ALSTINE, B. STREET, CORNELIUS FURMAN, W. W. BISHOP AND HORACE M. GOODRICH

*vs.*

MARTIN B. MILLER. } Bill for Injunction.

75. William H. Miller, being first duly sworn, on oath, doth depose and say that he has been a resident of Aurora, Illinois, for fifteen years last past; that he knows that on or about the first day of May, A. D., 1869, the supervisor and town clerk of the town of Aurora, County of Kane, and State of Illinois, issued to the Ottawa, Oswego and Fox River Valley Railroad Company sixty thousand dollars of the bonds of said town, in sums of one thousand dollars each, in payment of its subscription to the capital stock of said Ottawa, Oswego and Fox River Valley Railroad Company; that said bonds were deposited by the supervisor of said town, with John J. Donaldson and Henry A. Kent, of the City of New York, in trust, pending the fulfillment on the part of said railroad company of the conditions of said subscription.

That upon the fulfillment of said conditions the said bonds were delivered to the said railroad company. Said affiant further says that he knows that on or about the twenty-fifth day of November, A. D., 1870, the supervisor and town clerk of said town of Aurora, issued to the Chicago and Iowa Railroad Company the bonds of said town to the amount of one hundred thousand dollars in sums of one thousand dollars each, in payment ef its subscription to the capital stock of said Chicago and Iowa Railroad Company. The terms and conditions of its subscription to said

capital stock having first been fully complied with; that after the delivery of said bonds to said railroad companies, they were sold to various parties having no interest in or connection with said railroad companies, either directly or indirectly. And he believes that the purchasers of said bonds purchased them in good faith, without any knowledge or suspicion of any irregularity or illegality in their issue.

76

WM. H. MILLER.

Sworn and subscribed to before me this 6th day of March, A. D. 1873.

[NOTARIAL SEAL.] C. H. ADAMS,
*Notary Public.*

"SCHEDULE D.—Continued."

STATE OF ILLINOIS, }
*County of Kane,* }

AURORA, *October 11th*, 1870.

To the Auditor of Public Accounts of the State of Illinois, Springfield, Illinois:

SIR: I hereby certify that the following described bonds are entitled to registration in your office, under the provisions of the act entitled "An act to fund and provide for paying the railroad debts of counties, townships, cities, and towns," in force April 16th, 1869, the bonds being numbered from No. 1 to No. 10, inclusive, for $1,000 each, dated May 1st, 1869, amounting to ($60,000) sixty thousand dollars, payable: $10,000 on the 1st day of July, 1872; $10,000 on the 1st day of July, 1873; $10,000 on the 1st day of July, 1874; $10,000 on the 1st day of July, 1875; $10,000 on the 1st day of July, 1876; $10,000 on the 1st day of July, 1877—and bearing interest at the rate of ten per centum per annum, payable from the 1st day of July, 1869, annually. These bonds are issued by the township of Aurora, in the County of Kane and State of Illinois, to the Ottawa, Oswego and Fox River Valley Railroad Company, under name and by authority of the provisions of "an act authorizing certain cities, counties, incorporated towns, and townships to subscribe to the stock of certain railroads," approved February 18th, 1857, and by a vote of the people of said township at an election held on the 26th day of February, 1869.

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And I, as supervisor of said township, do hereby certify

that all the preliminary conditions in the act "in force April 16th, 1869," required to be done to authorize the registration of these bonds, and to entitle them to the benefits of said act last referred to, have been fully complied with. to the best of my knowledge and belief.

CHAS. WHEATON,
*Supervisor of the Town of Aurora, Kane County, Ill's.*

U. S. Internal Rev. Stamp. 5 cents.
C. W.
Oct. 11, 1870.

Subscribed and sworn to by the said Chas. Wheaton before me, this 11th day of October, A. D. 1870.

[NOTARIAL SEAL.] A. G. MCDALE,
*Notary Public.*

AUDITOR'S OFFICE, ILLINOIS,
SPRINGFIELD, *February 25th, 1873.*

I, Charles E. Lippincott, Auditor of Public Accounts of the State of Illinois, do hereby certify that the foregoing, and annexed instrument, is a true, full, and correct copy of a certificate of Chas. Wheaton, Supervisor of Aurora township, Kane County, Illinois, dated October 11th, 1870, in relation to $60,000-bonds of said township, issued in aid of the O., O. & F. R. V. R. R., now on file in, and forming a part of, the records of this office.

78

In testimony whereof, I hereunto subscribe my name and affix the seal of my office, at Springfield, the day and year first above written.

[AUDITOR'S SEAL.] C. E. LIPPINCOTT,
*Auditor Public Accounts.*

Endorsements.

State of Illinois, Auditor's Office.
Certificate of Chas. Wheaton, Supervisor of Aurora T'p, Kane Co., Illinois.
Registration of bonds issued in aid of the O., O. & Fox River Valley Railroad by Aurora T'p, Kane Co., Illinois.
Filed Oct. 13, 1870.
C. E. Lippincott, Auditor Public Accounts.

"SCHEDULE E."

Meeting of the board of town auditors of the town of Aurora, held August 12th, A. D. 1872.

Present: Chas. Wheaton, Supervisor and Justice of the Peace, Adam Phy, Ira H. Fitch, H. F. Van Nortwick, R. W. Gates, and C. H. Adams, and W. J. Pollock, clerk.

On motion of R. Wilder Gates, it was voted to certify the county clerk that it is necessary to raise by taxation ten thousand dollars for the payment of the bonds
79 of the Oswego, Ottawa, and Fox River Valley Railroad Co., coming due July 1st, A. D. 1873. Also, on motion of H. F. Van Nortwick, that one thousand dollars be raised for general town purposes.

On motion, adjourned.

CHAS. WHEATON, *Supervisor.*
C. H. ADAMS, *J. P.*
IRA H. FITCH, *J. P.*
H. F. VAN NORTWICK, *J. P.*
ADAM PHY.
W. J. POLLOCK, *Town Clerk.*
R. W. GATES, *J. P.*

I, W. J. Pollock, town-clerk of the town of Aurora, County of Kane and State of Illinois, do hereby certify that the foregoing is a true copy from the town records of the town of Aurora, showing the action of the board of town auditors relative to raising the money for payment of the bonds of said town, issued in aid of the construction of the Ottawa, Oswego, and Fox River Valley Railroad, falling due July 1st, 1873.

W. J. POLLOCK,
AURORA, *March 3, 1873.* *Town Clerk.*

(E. 2.)

STATE OF ILLINOIS,
AUDITOR'S OFFICE,
SPRINGFIELD, *February 25th, 1873.*

I, Charles E. Lippincott, Auditor of Public Accounts of the State of Illinois, do hereby certify that, as shown by the records of this office, the net amounts of "benefits"
80 accruing to the township of Aurora, in the county of Kane, and State of Illinois, on assessment for the year 1871, under the first section of an act entitled "An

act to fund and provide for paying the railroad debts of counties, townships, cities and towns," in force April 16th, 1869, are as follows:

| | |
|---|---|
| Net am't of State revenue tax collected on increased valuation over 1868..... | $833 63 |
| Net am't of State revenue tax collected from "railroad aided" on ass'm't 1871.... .... | 258 73 |
| Net am't of county taxes collected from "railroad aided" on ass'm't 1871..... | 208 14 |
| Net am't of local taxes collected from "railroad aided" on ass'm't 1871..... | 880 57 |
| Amounting in the aggregate to the sum of.... | $2,181 07 |

Twenty-one hundred eighty-one and $\frac{07}{100}$ dollars.

In testimony whereof I hereunto subscribe my name and affix the seal of my office, at the city of Springfield, this twenty-fifth day of February, A. D. 1873.

C. E. LIPPINCOTT,

[AUDITOR'S SEAL.] *Aud'r P. A.*

"SCHEDULE F."

To the Town Clerk of the Town of Aurora, in the County of Kane and State of Illinois:

We, the undersigned legal voters of said town, respectfully represent that a special town meeting and election is necessary to the interest of said town, to be held under the provisions of an act of the General Assembly of the State of Illinois, entitled "an act to incorporate the Chicago & Iowa Railroad Company," approved March 30, A. D. 1869, to determine whether said Town of Aurora shall, in its corporate capacity, subscribe to the capital stock of
81 the Chicago & Iowa Railroad Company to the amount of one hundred thousand dollars ($100,000), in the bonds of said town, for the purpose of aiding in the construction of said railroad, said bonds to be made payable within ten years from the date of their issue, and to bear interest from date at the rate of ten per cent. per annum, payable annually. Said bonds not to be issued or delivered to said company until the said railroad company shall have first located their said line of railroad to intersect the Chicago, Burlington and Quincy Railroad on west side of Fox River in said town of Aurora, and shall have laid the track

for the same from the point of intersection to the west line of said town, with a T-rail weighing not less than fifty pounds to the yard, the same to be done on or before the 31st day of December, A. D., 1870. And upon making the demand for said bonds the said railroad company shall issue and deliver to the supervisor of said town certificates of full paid stock of the said Chicago and Iowa Railroad Company to the amount of one hundred thousand dollars ($100,000), and the said town to have the same rights and privileges as other stockholders in said company. And upon compliance with the above conditions on the part of said railroad company it shall be the duty of the Supervisor and Town Clerk of said town to immediately issue and deliver to the president of said railroad company the bonds of said town, in such form and denomination
82 as may be agreed upon between the parties, to the amount of one hundred thousand ($100,000) dollars, in pursuance of the provisions of said act of the General Assembly, and another act now in force, entitled "an act to fund and provide for paying the railroad debts of counties, townships, cities, and towns.'

And we request you to immediately proceed to call an election and special town meeting in said town of Aurora, for the purpose of voting for or against said subscription.

AURORA, ILLINOIS, *July 12, A. D. 1869.*

| | |
|---|---|
| R. L. CARTER, | J. C. HANNA, |
| A. F. SHEDD, | J. R. HANNA, |
| B. F. PARKS, | IRA WILCOX, |
| WM. H. MILLER, | JOSEPH RISING, |
| V. A. WATKINS, | R. C. MIX, |
| WM. V. PLUM, | L. D. BRADY, |
| THOMAS MEREDITH, | W. H. HAWKINS, |
| E. R. ALLEN, | W. B. ALLEN, |
| CHAS. WHEATON, | J. A. COOK, |
| A. G. MCDALE, | C. L. HOYT, |
| A. C. LITTLE, | C. J. METZNER, |
| THOS. E. HILL, | L. W. GRAY, |
| GEO. LOUCKS, | FRED. OTIS WHITE, |
| JOHN RISING, | D. B. WATERMAN, |
| JOHN PLAIN, | O. B. KNICKERBOCKER. |

I, W. J. Pollock, town clerk of the town of Aurora,
83 do hereby certify that the above is a copy of a paper on file in my office bearing the following endorsement. "Filed July 13th 1869—M. Lies, Town Clerk."

W. J. POLLOCK.
*Town Clerk.*

Aurora, Ills., Feb. 27th 1873.

Minutes of a special town meeting held at City Hall
84 in the city of Aurora in the town of Aurora on the 5th day of Aug. A. D. 1869 pursuant to the following call.

"SPECIAL ELECTION NOTICE."

Office of the town clerk of the town of Aurora, in the County of Kane and State of Illinois.

To the voters of said town.

"Whereas twenty legal voters of the town of Au-
"rora in the County of Kane and State of Illinois have pre-
"sented and filed in my office their written application re-
"questing that an election and special town meeting be held
"in said town, to determine whether said town shall in its
"corporate capacity, subscribe to the capital stock of the
"Chicago and Iowa Railroad company to the amount of
"one hundred thousand ($100.000) dollars in the bonds of
"said town to aid in the construction of said railroad.

"Said bonds not to be issued until said railroad company
"shall have located their said railroad through said town,
"the same to start on the west side of Fox River and run
"to within one half mile of the center of said town, on the
"west line thereof, nor until the said company shall have
"constructed said rallroad through said town and laid the
"track for the same with a **T** rail to weigh not less than
"fifty pounds to the yard, the same to be completed on or
"before the 31st day of December, 1870.

85 "Now, therefore, I, Michael Lies, town clerk of said
"town of Aurora in pursuance of an act of the Gen-
"eral Assembly of the State of Illinois, entitled: "An act
"to incorporate the Chicago and Iowa Railroad company,"
"approved March 30, A. D. 1869, do hereby notify the legal
"voters of said town that an election and special town meet-
"ing will be held at the City Hall, in the city of Aurora,

"in said town on the 5th day of August A. D. 1869, to vote "for or against said subscription.

"And that the polls will be opened between the hours of "nine and ten o'clock in the forenoon o fsaid day, and remain "open until six o'clock in the afternoon unless otherwise "ordered.

"Dated Aurora, Kane County, Ill., July 14, A. D. 1869.

MICHAEL LIES.
Town clerk of said town.

The meeting was called to order by Michael Lies town clerk. On motion of B. F. Parks, John B. White was chosen moderator to preside at said meeting, and was first duly sworn by Michael Lies, town clerk, and thereupon entered upon the duties of his office. Michael Lies being compelled to act with supervisor Chas. Wheaton as the town board to equalize the assessment for the year 1869, F. E. Reynolds was chosen clerk of said meeting, and being first duly sworn by the moderator, John B. White, entered upon the duties of his office. The polls to decide whether the town of Aurora shall subscribe one hundred thousand dollars to the capital stock of the Chicago and Iowa Railroad company and issue one hundred thousand dollars of bonds of the town of Aurora therefor, to aid in building said railroad were opened by proclamation by the moderator.

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The following is a statement of the canvass and result of vote by ballot for the purpose above set forth at the said special town meeting held as aforesaid, at the time and place aforesaid, as publicly canvassed by the presiding officers at said town meeting. The whole number of votes cast were twelve hundred and eleven, of which eight hundred and thirteen votes were for subscription, and three hundred and ninety four votes were against subscription. There were four votes which were thrown out on account of there being two or more doubled together.

JOHN B. WHITE,
*Moderator.*

I, W. J. Pollock, town clerk of the town of Aurora, County of Kane, State of Illinois, do hereby certify that the above is a correct copy from the records of said town relative to an election and special town meeting held for the

purpose of determining whether said town should in its corporate capacity subscribe one hundred thousand dollars to the capital stock of the Chicago and Iowa Railroad company.

W. J. POLLOCK.
*Town Clerk.*

Aurora, Feb'y., 27th 1873.

87 Record of the meeting of the board of town auditors of the town of Aurora, County of Kane, State of Illinois, held Nov. 29th, 1870.

Present: Supervisor Chas. Wheaton, Justice of the Peace, Ira H. Fitch, C. H. Adams, and William Shepardson, and Town Clerk R. W. Gates. The board met at the office of the town clerk for the purpose of arranging and adapting a plan of issuing the bonds of said town, in pursuance to the tenor of the following petition, and of an election held thereby at a town-meeting, on the 5th day of August, A. D. 1869—the minutes of which said town-meeting are recorded on page 179 of this record. The following is a copy of said petition:

* * * * * * * *
* * * * * * * *

C. H Adams moved that the supervisor and town clerk issue one hundred thousand dollars ($100,000) to the Chicago and Iowa Railroad Company, payable as follows, to wit: Ten thousand dollars ($10,000) the first day of July, 1876; ten thousand dollars ($10,000) on the first day of July, 1877; twenty five thousand dollars ($25,000) on the first day of July, 1878; twenty-five thousand dollars ($25,000) on the first day of July, 1879; thirty thousand dollars ($30,000) on the first day of July, 1880. Carried.

On motion of C. H. Adams, the board of town auditors of the town of Aurora adjourned.

The annexed blank bond is a duplicate copy of one hundred bonds of one thousand dollars each, numbered from one to one hundred inclusive, issued by Charles
88 Wheaton, Supervisor, and R. W. Gates, Town Clerk, in accordance with the above motion set forth, dated November 25th, 1870.

R. W. GATES,
*Town Clerk.*

The following is a register of the Nos. of bonds issued as above set forth:

| | | | | | | | |
|---|---|---|---|---|---|---|---|
| Nos. | 1 | to | 30, | inclusive, | due | July | 1st, 1880. |
| " | 31 | " | 55, | " | " | " | " 1879. |
| " | 56 | " | 80, | " | " | " | " 1878. |
| " | 81 | " | 90, | " | " | " | " 1877. |
| " | 91 | " | 100, | " | " | " | " 1876. |

R. W. GATES,
*Town Clerk.*

UNITED STATES OF AMERICA,

STATE OF ILLINOIS. COUNTY OF KANE.

No.———. $1,000.

AURORA TOWN BOND.

Duplicate copy of bond issued to C. & I. Railroad Company.
Nov. 25th, 1870.
R. W. GATES,
*Town Clerk.*

Know all men by these presents that the town of Aurora, in the County of Kane and State of Illinois, is indebted to the Chicago and Iowa Railroad Company in the full and just sum of one thousand dollars—which sum of money said town agrees and promises to pay on the 1st day of July, 187–, to the said Chicago and Iowa Railroad Company, or bearer, with interest at the rate of ten per cent. per annum, payable annually on the first day of July, at the office of the Farmers' Loan and Trust Company of New York, in the city of New York, upon the delivery of the coupons severally hereto annexed, for which payment of
89 principal and interest, well and truly to be made, the faith, credit, and property of the said town of Aurora are hereby solemnly pledged, under authority of an act of the General Assembly of the State of Illinois, entitled "An act to incorporate the Chicago and Iowa Railroad Company," which said act was approved March 30th, A. D. 1869. This bond is one of a series numbering from 1 to 100 inclusive, for $1,000 each—which bonds, so numbered, are the only bonds issued by said town of Aurora under or by virtue of said act.

In witness whereof, the Supervisor and Town Clerk of the said town of Aurora have hereunto set their hands, this twenty-fifth day of November, A. D. 1870.

————, *Town Clerk.* ————, *Supervisor.*

I, W. J. Pollock, town clerk of the town of Aurora, County of Kane and State of Illinois, do hereby certify that the foregoing is a transcript from the records of said town.

W. J. POLLOCK,
*Town Clerk.*

Dated AURORA, ILL'S, *Feb'y 27, 1873.*

"SCHEDULE H."

90 STATE OF ILLINOIS, COUNTY OF KANE,
AURORA, *Nov. 28th, 1870.*

To the Auditor of Public Accounts of the State of Illinois, Springfield, Illinois:

SIR: I hereby certify that the following described bonds are entitled to registration in your office, under the provisions of the act entitled "An act to fund and provide for paying the railroad debts of counties, townships, cities and towns," in force April 16th, 1869, the bonds being numbered from No. 1 to No. 100, incl., for $1,000 each, dated Nov. 25th, 1870, amounting to ($100,000) one hundred thousand dollars, payable: $10,000 on the 1st day July, 1876; $10,000 on the 1st day July, 1877; $25,000 on the 1st day July, 1878; $25,000 on the 1st day July, 1879 $30,000 on the 1st day July, 1880—and bearing interest at the rate of ten per centum per annum, payable annually.

These bonds are issued by the township of Aurora, in the county of Kane, and State of Illinois, to the Chicago and Iowa Railroad Company, under and by authority of the provisions of "an act to incorporate the Chicago and Iowa Railroad Company, approved March 30, 1869, and by a vote of the people of said township at an election held on the 5th day of August, 1869, and, as supervisor of said township do hereby certify that all the preliminary
91 conditions in the act in force April 16th, 1869," required to be done to authorize the registrations of these bonds and to entitle them to the benefits of the said act last referred to, have been fully complied with to the best of my knowledge and belief.

CHAS. WHEATON,
*Supervisor of Aurora, Kane County, Illinois.*

Subscribed and sworn to by the said Chas. Wheaton before me, this 29th day of November, A. D. 1870.

C. H. ADAMS,
*Justice of Peace.*

AUDITOR'S OFFICE, ILLINOIS,
SPRINGFIELD, *February 25th, 1873.*

I, Charles E. Lippincott, auditor of public accounts of the State of Illinois, do hereby certify that the foregoing and annexed instrument is a true, full and correct copy of a certificate of Chas. Wheaton, supervisor of Aurora Township, Kane County, Illinois, dated Nov. 28th, 1870, in relation to $100,000 bonds of said township issued in aid of the Chicago and Iowa R. R. now on file in and forming a part of the records of this office.

In testimony whereof I hereunto subscribe my name and affix the seal of my office at Springfield, the day and year first above written.

{ AUDITOR'S OFFICE, ILLINOIS. SEAL. } C. E. LIPPINCOTT, *Auditor Public Accounts.*

**Endorsement.**

92 State of Illinois, Auditor's Office.

Certificate of Charles Wheaton, supervisor of Aurora T'p, Kane Co., Illinois.

Registration of bonds issued in aid of the Chicago and Iowa Railroad by Aurora Township, Kane Co., Illinois.

Filed Nov. 30, 1870.—C. E. Lippincott, auditor public accounts.

An ordinanance certifying to the clerk of the county of Kane the amount required to be raised by taxation by the city of Aurora for the year 1872.

Be it ordained by the common council of the city of Aurora:

SECTION 1. That the sum of twenty-seven thousand dollars, and the same is hereby, certified to the county clerk of the county of Kane as the sum required by the city of Aurora to be raised by taxation for the current year.

SECTION 2. That the city clerk shall forthwith deliver to said county clerk a certified copy of this ordinance.

93 STATE OF ILLINOIS, *Kane County City of Aurora.* } *ss.*

I, W. J. Pollock, clerk of the ——— do hereby certify that the above is a true copy of an ordinance —— —— —— passed by the common council of the city of Aurora,

on the tenth day of October, A. D. 1872, and I am entrusted with the safe keeping of the original of which the above and foregoing is a true and correct copy.

Witness my hand and the corporate seal of said city, this first day of March, in the year of our Lord 1873.

[CORPORATE SEAL.] W. J. POLLOCK,
*City Clerk.*

And also, to wit, on the 6th day of May, 1873, the same being one of the days of the May Term, 1873, of said court, an answer was filed in said court in the words and figures following, to wit:

STATE OF ILLINOIS, *Kane County, and the Circuit Court thereof for the May Term, A. D. 1873.*

The several answers of Henry C. Paddock to the bill of complaint of Wm. A. Tanner et al.

This respondent saving and reserving to himself
94 all manner of benefit and advantage to the many errors and imperfections of complainant's said bill of complaint for answer unto so much and such parts as he is advised are material and necessary for him to answer answering, says that he admits that he is county treasurer of said county, and as such it is his duty to go on and collect the taxes; that he only occupies a friendly relation and simply desires to do his duty in the premises; that he knows nothing positively in relation to the matters in controversy, but adopts the answer filed and asks that the answer of Martin B. Miller may be taken as a part of this his answer, and asks that strict proof may be made as regards the several and respective allegations of the said bill, and to meet that requirement he denies each and every allegation of complainant's bill of complaint; and he asks to be hence dismissed, with his reasonable costs in this behalf most wrongfully sustained.

B. F. PARKS,
C. D. F. SMITH,
A. G. MCDALE,
E. N. LEWIS,
*Sol. for Def'ts.*

95 And also, to wit: on the 6th day of May, 1873, the same being one of the days of the May Term, 1873, of said Court, a replication was filed in said Court in the words and figures following, to wit:

STATE OF ILLINOIS, } ss. *Kane County.* } *In the Kane County Circuit Court, in Chancery, May Term, 1873.*

WILLIAM A. TANNER, JOSIAH D. DUNNING, GEORGE M. HODDEN and others.
*vs.*
MARTIN MILLER, *Town Collector of the town of Aurora*, HENRY C. PADDOCK, *County Treasurer of Kane County.* } Replication.

And now come the complainants in the above case, and for replication to the answers and each of them of the said Martin B. Miller and Henry C. Paddock, say that they will aver and prove their said bill to be true in every respect, and sufficient to be answered unto; and that the said answers of the said defendants, and each of them is uncertain and untrue and insufficient to be replied unto.

All of which matters and things the complainants are ready to aver and prove as this court shall direct, and prays as in his said bill he has already prayed.

S. W. BROWN,
*Sol. for Comp.*

96 And also, to wit: on the 6th day of May, 1873, the same being one of the days of the May Term, 1873, of said court, a motion was filed in said court in the words and figures following, to wit:

STATE OF ILLINOIS, } ss. *Kane County.* } *In the Circuit Court. To the May Term, A. D., 1873.*

JOSIAH D. DUNNING, *et. al.*
*vs.*
MARTIN B. MILLER, *et. al.* } ss. *Motion to suppress parts of certain depositions.*

And now comes the said complainants by S. W. Brown, their solicitor, and move the court to suppress certain interrogatories and answers and parts of answers, and each of the same respectively occurring in certain deposi-

tions filed by the defendants in said cause, said interrogatories and answers and parts of answers being more particularly specified as follows, viz:

The 6th direct interrogatory in the deposition of Thomas C. Jewell, and the answer thereto. Also, the first and second lines of the answer to the 12th direct interrogatory. Also, the 15th and 18th direct interrogatories and answers thereto. Also, the 1st direct interrogatory, all in the deposition of said Jewell.

Also the 2d direct interrogatory and the answer thereto, the answer to the 3d direct interrogatory, and all except the last line and one half of the answer to the 4th direct interrogatory of the deposition of Edward Rummel.

97 Also, the answer to the 7th, to 8th and 12th direct interrogatories in the deposition of George H. Harlow.

Also, the 5th direct interrogatory and the answer thereto, in the deposition of James H. Paddock.

Also, the 6th direct interrogatory and the answer thereto, in the deposition of Daniel Shepard.

Also the 4th direct interrogatory and the answer thereto, in the deposition of J. N. Reece.

Also, the 7th direct interrogatory and the answer thereto, in the deposition of O. M. Hatch.

S. W. BROWN,
*Sol. for Complts.*

98 And, also, to wit, on the 6th day of May, 1873, the same being one of the days May Term, 1873, of said court, the following among other proceedings were had and entered of record in said court, to wit:

JOSIAH B. DUNNING ET AL.
*vs.*
MARTIN B. MILLER. } Bill.

This day comes the complainants herein, by S. W. Brown, their solicitor, and the defendant by Parks, Lewis, Smith, and McDale, their counsel, and by agreement of the parties it is ordered by the court that the bill herein filed as of February 20th, 1873, and the answer herein as of March 8th, 1873, and the answer of Henry C. Paddock, new party, be filed to-day.

Thereupon the complainants, by Brown, their solicitor, moved the court to suppress interrogatory third and answer of Edward Rummel in his deposition. Also interrogatory fourth and answer, except the last line. In the deposition of Harlow, interrogatories 7 and 8 and answer thereto, and interrogatories 12 and 13 and answers thereto. In deposition of Paddock, interrogatories 3 and 6 and answer thereto. In deposition of Shepherd, interrogatories 4, 5, and 6, and answer thereto.

To which motions the defendants by their attorneys then and there object.

The court being fully advised in the premises, sustains the motion to suppress the depositions, as asked for above, and orders that those portions of the depositions as
99 set forth in complainant's motion be suppressed.

To which ruling of the court in sustaining said motion to suppress said portions the defendants, by their attornies, then and there except.

Thereupon the court being fully advised in the premises, orders, adjudges and decrees as follows:

WILLIAM A. TANNER, JOSIAH D. DUNNING AND GEORGE M. HADDEN AND OTHERS
*vs.*
MARTIN B. MILLER,
*Town Collector;*
HENRY C. PADDOCK,
*Treasurer of Kane County.*

*In the Kane County Circuit Court, May Term, A. D.* 1873.

This day comes the complainants, by S. W. Brown, their attorney, and the defendants by Parks & Lewis, their attornies, and said counsel having agreed that a *pro forma* decree may be entered by the court, and the cause coming to be heard on the bill, answers and replication, and the proofs; and it appearing to the court that the said act of A. D. 1857, was never enacted by said legislature, and never became a law of said State, and the court, being fully advised, doth hereby order, adjudge and decree *pro forma* that an injunction issue out of this court, by the clerk thereof, against the said Henry C. Paddock, enjoining and restraining him, as treasurer of the county of Kane and State
100 of Illinois, from taking judgment in the county court of said Kane County against each and every or all

of the complainants, or against the property of each or any one of them, for the taxes levied for the purpose of paying the principal and interest on the bonds issued by the town of Aurora in aid of the construction of the Ottawa, Oswego & Fox River Valley Railroad, as stated and set forth in bill of complaint in this cause. And that the same be perpetual, and that the said Paddock be forever restrained and enjoined from taking judgment as above mentioned, or from in any other way attempting to enforce the collection of the same, and, as to the balance of the taxes, sought to be enjoined in and by said bill of complaint, the court doth order, adjudge and decree that, as to all those other taxes, the bill be dismissed without prejudice, it being the judgment of the court that the complainants have a complete remedy at law against the collection of the same. And the court doth further order and decree that the defendants pay the costs of these proceeding, and the complainant have execution therefor.

S. WILCOX, *Judge.*

To the ruling of the court rendering such decree the defendants then and there excepted.

Thereupon the defendants pray an appeal to Supreme Court of the State of Illinois, which appeal is allowed on condition that the defendants, within thirty days, file their appeal bond in the sum of three hundred dollars, with E. B. Mix and William H. Miller, as surety, and file a certificate of evidence in the same time.

101 And also, to wit, on the 6th day of May, 1873, the same being one of the days of May term ,aforesaid, of said court, a certificate of evidence was filed in said court in the word and figures following to wit:

STATE OF ILLINOIS, } ss. *In the Circuit Court,*
*Kane County,* } *To May Term A. D. 1873.*

Wm. A. TANNER, *et al.*
vs.
MARTIN B. MILLER *et al.*

Be it remembered that on the hearing of this cause at the May term of said court, A. D. 1873, the complainants, to maintain the issue on their part, give in evidence the cer-

tificate of the Secretary of State attached to the bill of complainants which certificate by agreement of the parties, is treated as an original certificate.

Also the printed journal of the Senate of the State of Illinois of the session of A. D. 1857. Complainants also offered proof, showing that the entries in said printed journal correspond exactly with those contained in the above mentioned certificate of the Secretary of State, so far as the proceedings of the Senate are concerned.

To all which evidence the defendants by their counsel then and there objected, but the Court permitted said evidence to be offered, to which ruling of the court the defendants, by their counsel, then and there excepted.

And the defendants, to maintain the said issue on their part, offered in evidence a certified copy of the act of
102 A. D. 1857, under and by virtue of which the said election was held, to subscribe to the stock of the Ottawa, Oswego and Fox River Valley Railroad. Also the printed laws of the State of Illinois, enacted by the Legislature of said state at its session in the year A. D. 1857, and printed by the authority of said Legislature. Also the two laws enacted by the Legislature of said state for the year A. D. 1869, which said laws are referred to in defendant's answer; to all and each of which said laws and statutes and acts the counsel for complainants then and there objected, which objection was overruled by the court to whichruling the counsel for complainants then and there excepted.

Also, the defendants offered in evidence all the exhibits relating to the Ottawa, Oswego and Fox River Valley Railroad. which are attached to defendant's answer, to which the complainants then and there objected, which objection was overruled by the court, to which ruling the complainants then and there excepted.

Also the affidavit of John C. Sherwin, which, by agreement of parties is to be regarded as a deposition duly taken.

Also the Auditor's certificate attached to said answer and which shows that said bonds issued to said railroad company have been duly registered in the office of said Auditor.

Also the certificate of said Auditor attached to said answer showing the amount of rebate of taxes obtained by said town of Aurora on account of the register of said bonds.

To all and each of which certificates the complainants
103 then and there objected, which objection was overruled by the court, to which ruling complainants then and there excepted.

Also the depositions of William H. Miller, Thomas C. Jewell, Edward Rummell, George H. Harlow, James H. Paddock, Daniel Shepard, J. N. Reese, O. M. Hatch, and William D. Latsch, except the portions of said depositions suppressed on motion of complainant's counsel.

To all and each of which said depositions and each part thereof the counsel for complainants then and there objected, which objection was overruled by the court, to which ruling the complainants then and there excepted.

Also the evidence of Charles Wheaton, who being first duly sworn, testified that he was for some years supervisor of the town of Aurora. That the said town of Aurora received $60.000 of the stock of the Ottawa, Oswego and Fox River Valley Railroad company, on account of the subscription by said town, of $60.000 to the stock of said company, that said stock was delivered to him as such supervisor when the town issued its bonds to said railroad, company for said amount of $60.000, and that he has been as such supervisor, custodian of said stock viz., of 600 shares of the same of $100 each; that $10.000 of the principal of said bonds has already been paid by said town by the levy of a special tax for the payment of the same. To all which evidence the complainants by their counsel then and there objected, but notwithstanding such objection the court permitted the same
104 to be offered. Whereupon the complainants by their counsel then and there excepted.

For the evidence above referred to as being paper attached to the bill, answer, &c., see the same as attached and heretofore copied.

Which by agreement of parties and order of court is not here recopied.

105 STATE OF ILLINOIS, } *ss.*
*Kane County.* }

J. D. DUNNING *et. al.* } Kane County Circuit Court, May
*vs.* } Term, A. D., 1873. Bill for an
MARTIN B. MILLER, } injunction.

Deposition of William H. Miller, produced, sworn and

examined before R. W. Gates, a Justice of the Peace, in said county and State aforesaid, on the first day of May, 1872, at the office of R. W. Gates, Esq., in the town of Aurora, in said county, by virtue of the notice hereto annexed.

William H. Miller, being first duly sworn, deposes and says as follows:

Int. 1. What is your name, age, occupation, and place of residence?

Ans. My name is William H. Miller, age is thirty-eight years, my occupation is that of banking.

Int. 2. State all you know in relation to the issuing of the bonds of the town of Aurora, to the Ottawa, Oswego, and Fox River Valley Railroad Company?

(Objected to by complainant as irrelevant and not the best testimony.)

Ans. I know that sixty thousand dollars in bonds 106 were issued by the town of Aurora to the Ottawa, Oswego and Fox River Valley Railroad Company to aid in the construction of the road and in payment of its subscription to the capital stock of said Railroad Company.

Int. 3. Were you present wiih the committee at the time an arrangement was made to issue the bonds? If yea, go on and state the arrangement and all that was done in pursuance of such arrangement.

Ans. I was. I was present with such committee and know the terms of arrangement. They were as follows, to wit: That the bonds should be made by the supervisor and clerk, and deposited in trust with John J. Donaldson and Henry A. Kent, of the city of New York, conditioned that they should be held for the town and delivered to the railroad company, so fast as the work of grading and tieing should progress through the town of Aurora, on monthly approximate estimates by the engineer, certified by R. C. Mix, of work done, and that when all the grading and tieing should be completed, then all the bonds should be delivered. The bonds were made and deposited pursuant to such arrangement.

Int. 4. Were any bonds issued pursuant to such arrangement? If yea, to whom issued and what was done with them.

(Objected to as a repetition of last answer.)

107 Ans. Yes; answer to third interrogatory is answer to this.

Int. 5. Was the work done contemplated in the arrangement above detailed, and at what time were the bonds delivered and under what circumstances?

(Objected to as leading and irrelevant.)

Ans. Yes. The work was done and the bonds were all delivered to the railroad company during the latter part of the year A. D., 1870, being more than a year after they were deposited with the trustees.

Int. 6. After the bonds were delivered to and became the property of the company, what was done with the bonds?

(Objected as leading.)

Ans. They were sold.

Int. 7. Are the bonds held by residents of this State?

Ans. Some of them are held by non-residents, but most of them are, I think, held by residents of the town of Aurora, in this State.

Int. 8. Did the firm of Mix & Miller sell any of these bonds? If yes, how many and at what price and what was done with the proceeds?

108 Ans. The firm of Mix & Miller sold all of them, most of them at their full face value, but some of them at a slight discount. The proceeds were paid to the contractors for the construction of the roads.

Int. 9. State all you know about the bonds being sold and if for value, state the same, and did you or the purchasers of said bonds have any knowledge or notice of any default or defect in said bonds.

Ans. I know they were sold, as stated in answer to interrogatory eight; and the firm of Mix & Miller sold them in the full faith that they were lawfully and regularly issued without any knowledge, notice or suspicion of any fault or defect in said bonds, or in the published law under which they were issued.

Int. 10. Give a full history of the voting to subscribe to the capital stock of the Ottawa, Oswego and Fox River Valley Railroad Company, the issuing of the bonds, the sale of the same, and the full history of the transaction as you know and understand it.

(Objected to as improper and not the best testimony.)

Ans. The question is pretty well answered by an-
109 swers to previous interrogatories, as I think the authorities of the town of Aurora called an election or special town meeting for the purpose of determining whether the town in its corporate capacity should subscribed to the capital stock of the Ottawa, Oswego and Fox River Valley Railroad Company, citing in said call the authority of law for making such subscription. The said law was found in the session laws of Illinois for the year A. D. 1857, published by authority of said State, and was, as I believe, universally supposed to be a valid law at that time and until long after said bonds were issued and sold. An election was held pursuant to said call, which resulted in authorizing their issue, and, as I have previously stated they were issued and sold.

Int. 11. State whether or not the Ottawa, Oswego and Fox River Valley Railroad Company has been built and the iron laid through the town of Aurora, and also state whether the same has been built from Streator, in LaSalle County to Geneva, in the county of Kane.

Ans. The road has been built from Streator to Geneva through the town of Aurora, and is now used and operated.

Cross-examination:

110

X-Int. 1. You state in your direct-examination that sixty thousand dollars in bonds were issued by the town of Aurora to the Ottawa, Oswego and Fox River Valley Railroad Company, what interest did those bonds bear and in what manner were the bonds drawn and when payable?

Ans. They bear interest at the rate of ten per cent. per annum, payable annually. The principal maturing at divers times, the shortest, I think, in three years from the first day of July, eighteen hundred and sixty-nine; the longest, I think, in nine years from the same date; they were coupon bonds.

X-Int. 2. When was the first coupons or interest payable on those bonds?

Ans. On the first day of July, A. D. 1870.

X-Int. 3. What committee have you reference to in your answers to direct-interrogations relative to the arrangements made for the issuing of these bonds?

Ans. A committee consisting of L. D. Brady, J. G. Stolp,

William V. Plum, E. R. Allen, the Supervisor Charles Wheaton, the Town Clerk Michael Lies, named in the call pursuant to which the election was held.

×-Int. 4. Were you one of the firm of Mix and Miller that sold these bonds?

111 Ans. Yes.

×-Int. 5. Did you examine the work on said railroad personally, previous to the issuing of these bonds?

Ans. So far as, in my opinion, it affected the legality of the issuing of these bonds, I did.

×-Int. 6. Did Mix and Miller, or any other parties, to your knowledge, contract for or purchase any or all of these bonds in question previous to the time Mix and Miller sold them to other parties?

Ans. Mix and Miller contracted for the purchase of all the bonds before they sold them.

×-Int. 7. Then the railroad company sold none of these bonds to the parties now holding them?

Ans. The railroad company sold the bonds to the contractors in consideration of the construction of the road. The contractors sold them to Mix and Miller, and Mix and Miller in turn sold them.

×Int. 8. Did Mix & Miller guarantee or indorse any part of these bonds, and if so, how many?

Ans. Mix & Miller did not guarantee or indorse any of these bonds?

×Int. 9. What price did Mix & Miller pay for these bonds.

112 (Objected to by counsel for defendant.)

Ans. Mix & Miller gave sixty thousand dollars for them.

×Int. 10. Who were the contractors that Mix & Miller bought these bonds from?

Ans. C. H. Force & Company.

×Int. 11. In what property were they paid for, cash or other property?

Ans. Cash.

×Int. 12. Did Mix & Miller, when they sold these bonds, reserve the coupons attached to them, or any part of them? If so, how many?

(Objected to by defendant.)

Ans. Yes. The coupons for one year's interest.

×Int. 13. In your direct answer you say that Mix &

Miller had no knowledge of any objection to the law referred to in the issue of these bonds referred to, until after the bonds were sold. What then did you learn relative to the law?

Ans. In the month of May or June, 1872, we learned that it was claimed that said law never passed the Senate of the State of Illinois.

WM. H. MILLER.

113 STATE OF ILLINOIS, } *ss.*
*Kane County.* }

I, R. W. Gates, a justice of the peace of said county, do certify that the foregoing deposition was taken by me at the time and place mentioned in the caption thereof; that the said witness was first duly sworn, and that after said deposition was written it was carefully read to said witness, and he thereupon signed the same. Witness my hand and seal, this first day of May, A. D., 1873.

R. W. GATES, [SEAL.]
*J. P.*

Fees $4, paid by defendant.

J. D. DUNNING *et. al.* } *Kane County, Circuit Court.*
*vs.* } *May Term. A. D, 1873. Bill for*
MARTIN B. MILLER, } *an injunction.*

S. W. BROWN, ESQ.

Take notice that on the first day of May next, at ten o'clock, a. m., at the office of R. W. Gates, and before him, a justice of the peace in the City of Aurora, I shall proceed to take the deposition of William H. Miller and John C. Sherwin, where and when you can be and appear and cross-examine, if you desire; said deposition to be used
114 in evidence upon the hearing of the above case.
Aurora, April 25, 1873.

B. F. PARKS,
*Atty for Deft.*

I accept service of the above notice, April 25th, 1873.

115 Deposition of Thomas C. Jewell, of the County of Sangamon, and State of Illinois, a witness of lawful age, produced, sworn and examined, on his oath, on the

ninth day of April in the year of our Lord, one thousand eight hundred and seventy-three, at the office of Secretary of State, in the City of Springfield, County of Sangamon and State of Illinois, by me, Lotus Niles, a notary public in and for the City of Springfield, in said county and State, on notice to complainants' solicitors, authorizing me, as notary public, to take the deposition of the said Thomas C. Jewell, a witness in a certain suit, and matter in controversy now pending and undetermined in the Circuit Court of the County of Kane, in the State of Illinois, wherein Jeremiah Goodwin, Anton Lozer, Adam Oxenslager, George Daily, Erasmus D. Bradley, Wm. A. Tanner, William A. Tanner and Henry Tanner (partners by the name and style of Tanner & Son,) Robert Johnson, Calcott Stowell, Josiah D. Dunning, George Hodden, Loren Gillett, B. Street, Cornelius Furman, William W. Bishop and Horace N. Goodrich are complainants, and Martin B. Miller is defendant, in behalf of the defendant as well upon interrogatories of the defendant as upon the cross-interrogatories of the complainants, the said Thomas C, Jewell, being first duly sworn by me as a witness in the said cause, previous to the commencement of his examination, to testify to the truth as well as on the part of the complainants as of the defendant, in relation to the matters in controversy between the complainants and the defendant, so far as he should be
116 interrogated, testified and deposed as follows:

THOMAS C. JEWELL, *Sworn:*

1st Q. What is your name, age, occupation, and place of residence?

A. Thomas C. Jewell; thirty-nine years; clerk; Springfield, Ill.

2nd Q. Have you been engaged in the office of the Secretary of State at Springfield, Ill.; if so, how long have you been so engaged, and to what extent are you familiar with the records and manner of doing business in that office?

Ans. I was engaged in the office of the Secretary of State from March, 1869, until April 15, 1871, and afterwards from April 1872, until January 13, 1873. I believe I am well acquainted with the records of the office, and as to the manner of doing business, I *know* I am well acquainted.

3rd Q. How and in what manner are the journals of the House and Senate kept, and in what form are they usually deposited in the office of the Secretary of State? State fully your knowledge on that subject.

[Question objected to by complainant.]

Ans. They are kept on sheets of cap paper, and are deposited in the office of the Secretary of State, bound together with tape.

4th Q. When such journals are deposited are
117 they certified to by any person; if so, by whom?

Ans. They are not.

5th Q. Is the journal of each day's proceedings bound together by itself.

Ans. Yes.

6th Q. Is there any original journal of the Senate for the year 1857, of the State of Illinois, kept as above indicated, now in the office of the Secretary of State, or has there been any of that year since you have been acquainted with the office?

Suppressed by the court as leading.

Suppressed by the court. Ans. Not that I know of.

7th Q. Have you ever made search for those original journals, or do you know of search having been made; if so, were any found?

Ans. Search was made and none were found.

8th Q. Did you, as clerk of the Secretary of State, ever make a certificate showing what appeared on what is called the journal record showed touching the passage by the State Senate of Illinois, for the year 1857, of "An act authorizing certain cities, counties, townships, and incorporated towns to subscribe to the stock of certain railroads." If yea, was that certificate based upon the original journal of the Senate for the year 1857, as kept by the clerk of the Senate, and could you find that original
118 journal as kept by the clerk of said Senate at the time you made that certificate?

Ans. Such certificate was made by me as clerk for the Secretary of State. The certificate was based upon what is known in the office of the Secretary of State as the original journal—the same being a copy of the minutes made by the clerk of the Senate, it being a copy of the

journal made according to the law providing for the copying of the laws, journals, etc. I have never been able to find the original minutes of the said journal, although I have repeatedly looked and inquired for them.

9th Q. I asked if the certificate was based upon the original journal as kept by the clerk of the Senate? Please answer.

Ans. I suppose not. I don't know.

10th Q. What has become of the original journals of the Senate?

Ans. I do not know.

11th Q. Is there any certificate attached to the so-called journal record upon which you acted, showing when said journal record was made and by whom it was made?

Ans. No; none.

12th Q. Is not that so-called journal record simply a purported copy of the original journal record made by
119 the secretary of the Senate, and is there anything upon the face of it showing that it was correctly and truly copied?

The first two lines of this answer suppressed.

Ans. I presume it is the copy made under the law. There is nothing to show that they were correctly and truly copied.

13th Q. What law do you refer to? Please give the title to it.

Ans. An act to provide for copying and distributing the laws and journals, and for other purposes, approved Feb'y 12, 1849.

14th Q. Since 1869, have the original journals, as made up by the Secretaries of the House and Senate, been deposited in the office of the Secretary of State? and do they remain there? and are they kept and preserved as the original journals of the House and Senate?

Ans. Yes.

15th Q. Prior to 1869, are there any of those original journals of the House or Senate, as made up by the Secretaries of the House or Senate, now in said office? and is it not a fact that all original journals of the House or Senate, prior to 1869, as made by the Secretaries of the House or Senate, are destroyed?

Suppressed by the Court as leading.

Ans. There are *certainly* none prior to 1867. I am not sure that the journals for that year are on file. Whether they were destroyed or not, I cannot say.

Suppressed by the Court.

120

16th Q. Are the original journals, as made by the Secretaries of the House or Senate, prior to 1867, on file in the office of the Secretary of State? and have they been since your connection with the office?

Ans. None at all—so far as I know.

17th Q. Prior to 1867, is there anything on file except copies of the journals of the House or Senate, or what purported to be copies? and is there any certificate thereto attached showing that said purported copies are correctly and truly copied?

Ans. There are none, to my knowledge, but copies—such as are provided for under the law referred to. There are no certificates attached to any of the journal records, so far as I know.

18th. Are not the journals, by you referred to, simply copies made by some copyist, without any certificate attached showing that they are correctly and truly copied?

Suppressed as leading by the court.

Suppressed. Answer. I presume they are.

19th Q. Look at the books now shown to you, marked "Senate Journal, 1857," and "Senate Journal, 1857–1859," and state whether or not both books are in the same handwriting and copied by the same person?

Ans. I cannot tell.

121

20th Q. State whether that portion of the so-called journal record, in book of proceedings marked "Senate Journal, 1857 and 1859," is paged?

Ans. No, sir; it is not.

20th Q. Are not all the proceedings in the passage of the law in controversy in this case by the Senate contained in the book marked "Senate Journal of 1857 and 1859?"

(Interrogatory withdrawn.)

*Cross-examination:*

1st Q. In your answer to the 12th direct interrogatory, you say, "I presume it is the copy made under the law." Is it not a fact that the journals referred to in said interrogatory purport, on their face, to be the original journals of said Senate?

Ans. We, in the office, have always held them to be such, and have issued certificates based upon them, as though they were the original records—in fact, considered them the original records.

2d Q. Do not said journals, on their face, purport to be the original journals of the Senate of the State of Illinois for the years 1857 and 1859?

Ans. We have used them as originals. The Sec-
122 retary of State, from 1869 to 1873, was compelled to look upon them as originals; there are no other *originals* that I know of in existence.

3d Q. In your answer to your last cross-interrogatory, you say, "the Secretary of State was *compelled* to look upon them as originals." What do you mean by the word "compelled?" Please answer.

A. I mean that they were the only records, of the character referred to, in the office of the Secretary of State—there was no other record for him to make a certificate from. He certified that the journals showed certain transactions, "as appeared from the records of his office." He, having taken the office as it was left him by his predecessor, could not do otherwise than follow in his footsteps and carry out what had always been the routine of his office.

4th Q. In your answer to the 18th direct interrogatory, you say, "I presume they are." Will you state whether you testify from your own knowledge or otherwise? State how the fact is.

Ans. I do not testify from my own knowledge. I know nothing about it. The certificates referred to are not attached.

5th Q. Do you know, of your own knowledge, how the journals of the Senate were kept during the year 1857?

Ans. No. I do not.

123 6th Q. State if you know whether the journals shown

you purport to show all the proceedings of the Senate for the year 1857.

Ans. They do.

7th Q. In answer to the 3rd direct interrogatory, you give the manner in which the journals of the Senate are kept. Will you state fully and particularly how the same are kept? And state also the time to which you refer.

Ans. My knowledge of the keeping of the journals of the two houses will not reach back of 1865. Since that time the journals were written on sheets of cap paper, bound up at night, after the session, with red tape—sometimes, but not always deposited in the office of the Secretary of State. It was the business of the secretaries of the two Houses to make up the journals. Frequently the journals were not deposited before the end of the session.

8th Q. You know nothing, then, of your own knowledge in regard to the subject matter contained in the last interrogatory, prior to 1865.

Ans. I had no knowledge prior to 1865.

*Direct Examination, resumed:*

Suppressed by the Court as leading. 124

21st Q. Was not the Secretary of State compelled to treat them as original journals, for the reason that there were no originals on file?

Ans. He was.

22d Q. Is there one word in the journal books, about which you have been testifying, declaring that [that] those books contained all the proceedings of the Senate for the year 1877?

Ans. Not that I know of.

*Cross Examination, resumed:*

8th. Q. In answer to the last above interrogatory you answer, "Not that I know of." Will you swear that there are any other journals in the office of the Secretary of State than those heretofore testified to by you, purporting to give the proceedings of the Senate, or any portion thereof, for the year 1857?

Ans. I will not.

9th. Q. Are there any such journal or journals in the

office of the Secretary of State, other than those testified to by you, purporting to give the proceedings of the Senate for the year 1857?

Ans. None that I know of.

THOMAS C. JEWELL.

Subscribed and sworn to before me this ninth day
125 of Aprll, 1873.

Notary Public.
LOTUS NILES.
[NOTARIAL SEAL] *Notary Public.*

I, Lotus Niles, of the County of Sangamon. and State of Illinois, a Notary Public in, and for the city of Springfield in said county, in the state aforesaid, duly commissioned and authorized to take the deposition of the said Thomas C. Jewell, a witness, whose name is subscribed to the foregoing deposition, do hereby certify, that previous to the commencement of the examination of the said Thomas C. Jewell, as witness in said suit, between the said Jeremiah Goodwin, Anton Lozer, Adam Oxenslager, George Daily, Erasmus D. Bradly, William A. Tanner, Wm. A Tanner and Henry Tanner (partners by the name and style ofTanner & Son) Robert Johnson, Calcott Stowell, Josiiah D. Dunning, George Hadden, Loren Gillett, B. Street Cornelius Furman, William W. Bishop and Horace N. Goodrich, complainants, and Martin B. Miller, defendant, he was duly sworn by me to testify the truth, in relation to the matters in controversy between the said Jeremiah Goodwin, Anton Lozer, Adam Oxenslager, George Daily, Erasmus D. Bradly, Wm. A. Tanner, William A. Tanner and Henry Tanner, (partners of the name and style of Tanner & Son) Robert Johnson, Calcott Stowell, Josiah D. Dunning George Hadden. Loren Gillett, B. Street, Cornelius Furman, Wm. W. Bishop,
and Horace N. Goodrich, complainants, and the said
126 Martin B. Miller, defendant, so far as he should be interrogated concerning the same. That the said deposition was taken by me in the office of the Secretary of State, in the city of Springfield, in the county of Sangamon, in the State of Illinois, on Wednesday, the ninth day of April, A. D. 1873, and that after the said deposition was taken by me as aforesaid, the interrogatories and answers thereto, as written down were read over to the said witness,

and that thereupon the same were signed and sworn to, by the said deponent, to wit: Thomas C. Jewell, before me, the oath being administered by me, at the place, and on the day and year last aforesaid,

In witness whereof, I hereto set my hand and affix my Notarial Seal, this 9th day of April, A. D. 1873.

LOTUS NILES.
*Notary Public.*

[NOTARIAL SEAL]

Peter

127 STATE OF ILLINOIS, } ss *In the Circuit Court. To*
*County of Kane.* } *the May Term, A. D. 1873.*

JEREMIAH GOODWIN, ANTON LOSER, ADAM OXENSLAGER, GEORGE DAILY, ERASMUS D. BRADLEY, WM. A. TANNER, (*and Wm. A. Tanner & Henry Tanner, partners by the name and style of Tanner & Son,*) ROBERT JOHNSON, CALCOTT STOWELL, JOSIAH D. DUNNING, GEORGE HADDEN, LOREN GILLETT, B. STREET, CORNELIUS FURMAN, WM. W. BISHOP AND HORACE N. GOODRICH
*vs.*
MARTIN B. MILLER.

*To S. W. Brown, the solicitor*
*for the above named complainants:*

You are hereby notified that on Wednesday, the 9th day of April, A. D. 1873, and from day to day thereafter, until concluded, at the hour of 10 o'clock A. M., before Lotus Niles, a notary public, at his office, in the city of Springfield, in the county of Sangamon, in the State of Illinois, we shall proceed to take the depositions of Edward Rummel, George Harlow, Thomas C. Jewell, A. J. Lullam, James H. Paddock, Gussham Martin, Daniel Sheppard, J. N. Reese and O. M. Hatch, to be used on the trial of the above entitled cause, for and in behalf of the above named defendant, when and where you can appear and cross-examine said witnesses if you see fit.

128 AURORA, *March 25th* 1873.

B. F. PARKS &
A. G. MCDALE,
*Solicitors for Defendant.*

I accept service of, or a true copy of, the above notice, this 25th day of March, 1873.

S. W. BROWN,
*Att'y for Complainants.*

It is stipulated that Thomas C. Jewell should be substituted in place of Lotus Niles as to the taking of all the depositions, except as to Thomas C. Jewell, and no exception should be taken to the same. It is further agreed that each and every interrogatory and answer thereto is objected to by complainants, and every cross-interrogatory and answer thereto is considered as objected to by defendants. It is further agreed that the several books shown the several witnesses, and about which the several and respective witnesses testified, are the ones from which the certificate attached to complainants' bill was made. This to be returned by Thomas C. Jewell as a part of the depositions in this cause.

SPRINGFIELD, *April 9th*, 1873.

B. F. PARKS,
*for Def't.*
G. W. HALLENBACK,
*For Comp'ts.*

129 Depositions of Edward Rummel, George H. Harlow, J. N. Reese, of the county of Sangamon, and State of Illinois, and James H. Paddock, of the county of Kankokee, in said State, and Daniel Shepard, of the county of Cook, in said State, witnesses of lawful age, produced, sworn and examined on their respective oaths, on the ninth day of April, in the year of our Lord one thousand eight hundred and seventy-three, and also the deposition of O. M. Hatch, of the county of Sangamon, and State of Illinois, a witness of lawful age produced, sworn and examined on the twenty-second day of April, in the year of our Lord one thousand eight hundred and seventy-three, at the office of Secretary of State, in the city of Springfield, county of Sangamon, and State of Illinois, by me, Thomas C. Jewell, a notary public, in and for said county, in the State aforesaid, on the notice of complainants' solicitors, and stipulation of the respective attorneys of complainants and defendant, hereto attached and made a part of this deposition, authorizing me, as said notary public, to take the depositions of the said Edward Rummel,

George H. Harlow, J. N. Reece, James H. Paddock, Daniel Shepard and O. M. Hatch, witnesses in a certain suit and matter in controversy, now pending and undetermined in the Circuit Court of the county of Kane, State of Illinois, wherein Jeremiah Goodwin, Anton Loser, Adam Oxenslager, George Daily, Erasmus D. Bradley, Wm. A. Tanner, (and Wm. A. Tanner and Henry Tanner, partners by the name and style of Tanner & Son,) Robert Johnson, Calcott Stowell, Josiah D. Dunning, George Hadden, Loren Gillett, B. Street, Cornelius Furman, William W. Bishop and Horace N. Goodrich are complainants, and Martin B. Miller is defendant; in behalf of the defendant, as well upon interrogatories of the defendant, as upon the cross-interrogatories of the complainants, the said Edward Rummel, George H. Harlow, J. N. Reese, James H. Paddock, Daniel Shepard and O. M. Hatch, being first duly sworn by me as witnesses in the said cause, previous to the commencement of the examinations, respectively, to testify to the truth, as well on the part of the complainants as of the defendant, in relation to the matters in controversy between the complainants and the defendant, so far as they should be interrogated, testified and deposed as follows:

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Interrogatories propounded to the said Edward Rummel, a witness produced and sworn, as aforesaid, on the part of the said defendant, and his answers thereto as follows:

*Edward Rummel*—Sworn:

1st Q. What is your name, age, occupation, place of residence, and were you ever Secretary of State. If yea, when?

Ans. Edward Rummel; 37 years; editor; Springfield. I was Secretary of State from 1869 to 1873.

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2d Q. During the time you were Secretary of State was there any original journal of the House or Senate made by the secretaries thereof, prior to 1865, on file in your office?

Ans. I presume not. I have frequently instructed my clerks to look for any of them, and was informed that none could be found. I never looked myself.

Suppressed by Court.

3d Q. Look at the books now shown you and state

whether they are the original journals of the Senate for 1857, or simply copies?

Ans. suppressed by the Court.

Ans. I suppose they are copies made of the minutes as taken down by the respective clerks of each house.

*Cross-Examination:*

1st Q. Will you swear, positively, that said journals now shown you are copies of the original journals?

Ans. I cannot do so.

2d Q. Do not said journals purport to be the original journals of the Senate for the year 1857?

Ans. I suppose they do.

*Direct Examination Resumed:*

4th Q. In your judgment are said books copies of the original journals for the year 1857, as made by the Secretary of the Senate, or are they originals as made by the Secretary of the Senate?

Suppressed by the Court, except the last line and one half.

Ans. In my judgment they are not the originals made by the Secretary of the Senate, but they were treated as originals in my office.

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*Cross-Examination Resumed.*

3d Q. Will you swear positively that said journals are not the originals as made by the Secretary of the Senate?

Ans. I cannot do so.

EDWARD RUMMEL.

Sworn and subscribed to before me, this 9th day of April, A. D., 1873.

[NOTARIAL SEAL,] THOMAS C. JEWELL,
*Notary Public.*

Interrogatories propounded to the said George H. Harlow, a witness, produced and sworn as aforesaid, on the part of the said defendant, and his answers thereto, as follows.

*George H. Harlow*—Sworn.

1st Q. What is your name, age, occupation and residence; and if you occupy any official position, please state it?

Ans. George H. Harlow; 42 years; Secretary of State; Springfield, Illinois. I am Secretary of State.

2d Q. How long have you been acquainted with the duties of the office of Secretary of State, and the records and files of said office, and the manner of doing business in said office? State fully.

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Ans. To some extent, 8 years. Familiar with the duties for four years.

3d Q. State whether or not there are on file in your office any original journals or the House and Senate, made by the Secretaries thereof, prior to the year 1865, and have you ever searched for the same, and to what extent have you searched?

Ans. There are none. I have never searched for the same. I have had my clerks look for them.

4th Q. Do you know the manner and form in which those journals of the House and Senate are gotten up by their respective clerks, and in what shape are they when they are deposited in your office?

Ans. I do. They are gotten up on partly printed and blank sheets filled up by the clerks, each day's journal being fastened by itself and deposited in that form with the Secretary of State.

5th Q. Since the year 1869, have those original journals, just spoken of by you, been preserved in your office?

Ans. It was the intention of the Secretary of State that they should be preserved, and I think they have been.

6th Q. Prior to 1869, what became of those original journals?

Ans. Of that I have no personal knowledge

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7th Q. In your judgment, and from your knowledge of the office, the manner of conducting the business of the office, are those original journals of the House and Senate prior to 1865, destroyed or not?

This is suppressed by the court.

Ans. I have no knowledge of the office prior to the year 1865; but judging from what I know of it now I should suppose that they have either been lost or destroyed.

8th Q. Look at the books, now shown to you, marked Senate Journal, 1857, and Senate Journal, 1857 and 1859, and state whether or not those books, in your judgment, are original journals, made by the clerk of the Senate, or simply copies made in the office of the Secretaryot State, after the adjournment of the Legislature, from originals furnished by the secretary or clerks of the Senate.

Suppressed by the court.

Ans. From my knowledge of the law and custom, I should judge that they were simply copies made from the original journals furnished by the Secretary of the Senate as provided by law.

9th Q. Is there any certificate of any name or kind attached to those books, stating that they have been correctly and truly copied?

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Ans. No, sir.

10th Q. Are there on file in your office certain books marked "Senate Journals," "House Journals," 1857–1859, and for several successive sessions?

Ans. There are.

11th Q. So far as your knowledge extends, when, with respect to the time of the sitting of the assemblies, the proceedings of which they purport to show, were these "journals" made?

Ans. I know nothing concerning the journals of 1857–1859, nor when the copies of them were made.

12th Q. Since you have been familiar with the affairs of this office, has it not been the practice to make these "journals" after the adjournment of the assembly in the office of Secretary of State, from the originals furnished by the clerks of the two Houses?

Ans. It has been the custom for the Secretary of the Senate to furnish the Secretary of State with the original journals as soon as revised by him, in order for him to furnish the same to the contractor for copying during the session of the Legislature.

Suppressed by the court.

13th Q. As a matter of fact are these copies of the "journals" usually, if ever, completed before the adjournment of the Legislature?

Ans. They are never completed until after adjournment.

136 *Cross Examination:*

1st Q. Have you any knowledge of your own, independent of the records and files of your office, in relation to the manner in which the journals of the Senate have been kept prior to the year 1865?

Ans. I have none.

2d Q. In answer to the fourth direct interrogatory, you stated the manner in which the journals of the Senate are gotten up. You will please state if said journals, as they came from the hands of the Secretary of the Senate to the Secretary of State, are in proper shape or condition to make a correct and intelligent record, and if it is not necessary to transcribe the same in order that that end may be attained?

Ans. The law requires the copy to be made, but I do not think it necessary for an intelligible understanding of the same.

3d Q. In answer to the seventh direct interrogatory you say, as a portion of your answer, that you suppose the originals to be lost or destroyed. Have you any positive information on that subject, or will you swear positively that such is the fact?

Ans. I have no positive information.

4th Q. Do not the journals now shown you purport to be the original journals of the Senate for the year 1857?

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Ans. There is nothing on them to show that they are or that they are not the original journals?

5th Q. Do you ever, as Secretary of State, certify the proceedings contained in said journals?

Ans. Yes, sir; when called upon.

6th Q. In answer to the twelfth interrogatory you speak of a contractor. Will you please state what was the business of such contractor?

Ans. The business of such contractor was to copy the original journals into bound volumes, and also to copy the laws and journals for the printer.

7th Q. Do you know, or can you tell, how the printed journals of the Senate were or are made up? If so, state whether it is or is not printed from the original minutes of the Secretary of the Senate, or printed from copy authorized

by law made from such original? State all you know on the subject.

Ans. The printed copies of the journals have, since 1867, been made from copies furnished by the Secretary of State or the contractor for copying.

138 *Direct Resumed.*

8th Q. From your present knowledge, would you now, as Secretary of State, certify from those books as original journals made by the Secretary of the Senate?

Answer. I would not, but would certify from them as accepted copies of the original journals.

GEO. H. HARLOW.

Subscribed and sworn to before me this 9th day of Apr'l, 1873.

[NOTARIAL SEAL.] THOS. C. JEWELL, *N. P.*

Interrogatories propounded to the said James H. Paddock, a witness, produced and sworn as aforesaid, on the part of the said defendant, and his answers thereto, as follows:

*James H. Paddock*—Sworn.

1st Q. What is your name, age, occupation and residence, and what is your present official position?

Ans. James H. Paddock; 22 years; clerk; Kankakee; Ass't Secretary of the Senate.

2d Q. Are you familiar with the manner in which the journals of the Senate are kept?

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Ans. I am.

3d Q. State in what manner they are kept?

Ans. We use legal cap paper and blanks which we have for that purpose, which are bound together each day; the journal of each day being numbered.

4th Q. Look at the books now shown you, marked "Senate Journal 1857" and Senate Journal 1857 and 1859, and state whether they are the original journals made by the Secretary of the Senate, or simply copies of the original minutes?

Suppressed by the court, both question and answer.

Ans. I don't know. We make up no such books. We have always followed precedent.

× 5th Q. In your judgment, are they original journals or copies of the original journals?

× Ans. They are copies, in my judgment.

6th Q. How long have you been familiar with the manner of keeping the journals of the House and Senate?

Ans. Eight years.

*Cross-Examination.*

1st Q. Are you willing to swear, positively, that the journals shown you are copies and not originals?

Ans. No, sir.

140 JAMES H. PADDOCK.

Subscribed and sworn to before me, this ninth day of April, A. D. 1873.

[NOTARIAL SEAL.] THOMAS C. JEWELL,
*Notary Public.*

Interrogatories propounded to the said Daniel Shepard, a witness, produced and sworn as aforesaid, on the part of the said defendant, and his answers thereto, as follows:

*Daniel Shepard*—Sworn.

1st Q. What is your name, age, occupation, place of residence, and what is your present official position?

Ans. Daniel Shepard; 37 years; lawyer; Chicago, Ill.; Clerk, House of Representatives.

2d Q. Are you familiar with the manner that the journals of the House of Representatives and Senate are kept in Illinois?

Ans. I am.

3d Q. How long have you been acquainted with the manner of keeping the journals?

Ans. For the last three sessions, including the present.

4th Q. State the manner of keeping them, briefly?

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Ans They are written on legal cap paper with printed blanks, and each day's proceedings fastened together and kept separate and numbered.

5th Q. Is there any other journal but that kept?

Ans. Not by the officers of the two Houses, so far as I am aware of.

6th Q. Look at the books now shown you, marked "Sen-

ate Journal 1857" and 1857–1859, and state, whether or not, in your judgment, they are the original journals kept by the Secretary of the Senate, or simply copies of the Senate journals?

This answer and interrogatory suppressed.

Ans. In my judgment they are copies and not the original.

*Cross-Examination.*

1st Q. Are you willing to swear, positively, that the journals shown you are copies and not originals?

Ans. I am not.

2d Q. In your answer to the 6th direct interrogatory you state that in your judgment the journals now shown you are copies. Will you please state the reason upon which you base your conclusions?

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Ans. I understand that the present manner of making journals has been the custom heretofore, and I would not consider it feasible to put a journal in book form every day.

3d Q. Do you know, of your own knowledge, that such was the practice in the year 1857?

Ans. I know nothing of my own knowledge prior to the session of 1869.

4th Q. What does the book you hold in your hand purport to be?

Ans. The journal of the Senate of the State of Illinois.

5th Q. For what year?

Ans. 1857.

DANIEL SHEPARD.

Subscribed and sworn to before me, this 9th day of April, A. D., 1873.

[NOTARIAL SEAL.] THOS. C. JEWELL,
*Notary Public.*

Interrogatories propounded to J. N. Reese, a witness produced and sworn as aforesaid, on the part of the said defendant and his answer thereto as follows:

143 *J. N. Reese—Sworn:*

1st Q. What is your name, age, occupation and place of residence?

Ans. J. N. Reese; 32 years; clerk; Springfield, Illinois.

2d Q. Are you familiar with the manner of keeping the journals of the Senate and House of Representatives of the State of Illinois? And how long have you been acquainted with the manner of keeping the same, and under what circumstances did you become familiar with the manner of keeping them?

Ans. I am familiar with the manners of keeping the journals of the House of Representatives so far as it relates to the 27th General Assembly. I was assistant clerk of the House of Representatives. I have heard the testimony of Daniel Shepard, and so far as relates to the manner of keeping the journals, he has correctly described it.

3d Q. Are you now employed in the office of Secretary of State?

Ans. I am.

4th Q. Look at the books now shown you, marked Senate journals, 1855 and 1857-1859, and state whether or not, in your judgment, those books are the originals as kept by the Secretary of the Senate, or copies of said origi-

144 nal journals.

**This answer and interrogatory suppressed by the Court.**

Ans. In my judgment they are not the original journals as kept by the Secretary of the Senate.

*Cross-Examination.*

1st Q. Did you ever see the original journals of the Senate for the year 1857?

Ans. No, sir.

2d Q. If you never saw the original Senate journals, how do you arrive at the conclusion that the books shown you are not the originals themselves?

Ans. Custom, so far as my experience goes, has been to keep the journal from day to day on printed blanks and legal cap. I do not consider it practicable to keep the journal in this form.

3d Q. What was the custom of keeping the Senate journal in the year of 1857; if you know of your own knowledge, state?

Ans. I do not know.

4th Q. Will you swear, positively, that the books shown you and referred to by you in your answer to the fourth direct interrogatory, are not the original journals of the Senate for the year 1857?

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Ans. I will not.

J. N. REESE.

Subscribed and sworn to before me, the ninth day of April, A. D. 1873.

[NOTARIAL SEAL.] THOS. C. JEWELL,
*Notary Public.*

Adjourned until Monday, April 14th, at 9 o'clock A. M.

MONDAY, *April 14th, 1873.*

The witnesses not being present, adjourned, by agreement of attorneys, until Monday, April 21st, 1873, at 10 o'clock A. M.

MONDAY, *April 21, 1873*,—ten o'clock A. M.

O. M. Hatch being present was duly sworn, and the following proceedings were had:

Interrogatories propounded to O. M. Hatch, a witness, produced and sworn as aforesaid, on the part of the said defendant, and his answers thereto, as follows:

146 *O. M. Hatch*—Sworn.

1st Q. What is your name, age, occupation, and place of residence?

Ans. O. M. Hatch; age, 57 years; a business man; Springfield, Illinois.

2d Q. Were you Secretary of State of the State of Illinois from A. D. 1857 to A. D. 1865, and, if yea, as such, were you the custodian of the records and files of that office?

Ans. I was Secretary of State during that period; I was the custodian of the files and records of the office.

3d Q. Were you then acquainted with the manner in which the journals of the House and Senate were kept by the secretaries and clerks of said House and Senate?

143 *J. N. Reese—Sworn:*

1st Q. What is your name, age, occupation and place of residence?

Ans. J. N. Reese; 32 years; clerk; Springfield, Illinois.

2d Q. Are you familiar with the manner of keeping the journals of the Senate and House of Representatives of the State of Illinois? And how long have you been acquainted with the manner of keeping the same, and under what circumstances did you become familiar with the manner of keeping them?

Ans. I am familiar with the manners of keeping the journals of the House of Representatives so far as it relates to the 27th General Assembly. I was assistant clerk of the House of Representatives. I have heard the testimony of Daniel Shepard, and so far as relates to the manner of keeping the journals, he has correctly described it.

3d Q. Are you now employed in the office of Secretary of State?

Ans. I am.

4th Q. Look at the books now shown you, marked Senate journals, 1855 and 1857-1859, and state whether or not, in your judgment, those books are the originals as kept by the Secretary of the Senate, or copies of said original journals.

144 **This answer and interrogatory suppressed by the Court.** Ans. In my judgment they are not the original journals as kept by the Secretary of the Senate.

*Cross-Examination.*

1st Q. Did you ever see the original journals of the Senate for the year 1857?

Ans. No, sir.

2d Q. If you never saw the original Senate journals, how do you arrive at the conclusion that the books shown you are not the originals themselves?

Ans. Custom, so far as my experience goes, has been to keep the journal from day to day on printed blanks and legal cap. I do not consider it practicable to keep the journal in this form.

3d Q. What was the custom of keeping the Senate journal in the year of 1857; if you know of your own knowledge, state?

Ans. I do not know.

4th Q. Will you swear, positively, that the books shown you and referred to by you in your answer to the fourth direct interrogatory, are not the original journals of the Senate for the year 1857 ?

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Ans. I will not.

J. N. REESE.

Subscribed and sworn to before me, the ninth day of April, A. D. 1873.

[NOTARIAL SEAL.] THOS. C. JEWELL,
*Notary Public.*

Adjourned until Monday, April 14th, at 9 o'clock A. M.

MONDAY, *April 14th, 1873.*

The witnesses not being present, adjourned, by agreement of attorneys, until Monday, April 21st, 1873, at 10 o'clock A. M.

MONDAY, *April 21, 1873*,—ten o'clock A. M.

O. M. Hatch being present was duly sworn, and the following proceedings were had:

Interrogatories propounded to O. M. Hatch, a witness, produced and sworn as aforesaid, on the part of the said defendant, and his answers thereto, as follows:

146 *O. M. Hatch*—Sworn.

1st Q. What is your name, age, occupation, and place of residence ?

Ans. O. M. Hatch; age, 57 years; a business man; Springfield, Illinois.

2d Q. Were you Secretary of State of the State of Illinois from A. D. 1857 to A. D. 1865, and, if yea, as such, were you the custodian of the records and files of that office ?

Ans. I was Secretary of State during that period; I was the custodian of the files and records of the office.

3d Q. Were you then acquainted with the manner in which the journals of the House and Senate were kept by the secretaries and clerks of said House and Senate ?

Ans. I was.

4th Q. Do you know how the journals of the Senate and House are now kept by the secretaries thereof, and if the manner of keeping said journals, in 1857, was the same as now used, please state the same?

Ans. I am not familiar with the present manner
147 of keeping the journals. I do not know whether they are kept now as they were then.

5th Q. State, if you know how, in what manner and form these journals were kept by the clerks of the House and Senate in 1857, and in what form and shape they were deposited in your office?

Ans. Each day's journal was made up by itself, partly upon printed blanks, balance written. They were tied together with tape firmly, the ends of which sealed with sealing-wax.

6th Q. What has become of the original journals made by the Secretaries of the Senate in the year A. D. 1857; if lost or destroyed, give us your best knowledge, information and belief as to what has become of them?

Ans. I think the original journals, as prepared by the secretary and clerk of the respective Houses, after being copied into a book or record, were sent to the public printer. After they were set up in printed form, the form was compared with the original, usually at the office of the public printer; and it is my belief that they were not returned to the secretaries' office by the public printer that year. Where they are I do not know.

7th Q. Look at the books now shown you, and
148 marked Senate journals 1857" and "1857 and 1859," and state, whether or not, they are the original journals of the Senate made by the Secretary of the Senate, and under his direction and supervision, or are they simply copies made by a contractor who made the copies by the job?

Suppressed as leading by the court.

Ans. I have examined the books shown me, purporting to be the Senate journals for 1857 and 1857 and 1859; they are copies of the original journals made by the persons who took the contract those years for copying. They are not the originals.

Suppressed by the court.

8th Q. Have you any personal knowledge as to whether or not said Senate journals were correctly and truly copied?

Ans. I have not.

*Cross-Examined.*

1st Q. Is there anything in said journals, or either of them, showing that they, or either of them, are not the original journals of said Senate?

Ans. There is not.

2d Q. Look upon the third page of the book or volume before you and state what the same purports to be?

Ans. It purports to be the journal for the session held in 1857.

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3d Q. What is the day of the date of the proceedings of said Senate upon the page above referred to?

Ans. Monday, January 5th, 1857.

*Adjourned until 8 o'clock to-morrow morning.*

TUESDAY, *April 22d, 1873, 8 o'clock, p. m.*

*Cross-Examination Resumed:*

4th Q. Look at the name at the top of the page before you in the record, marked "Senate Journal 1857 and 1859," and state whose name that is, and if that person held any position or office in the Senate at that session; state what that office or position was?

Ans. W. D. Latshaw, who was Secretary of the Senate at the session in 1857, whose duty it was to make up the journal.

5th Q. How is the name signed in the book or record before you? If any official character, state what.

Ans. The name in the journal before me is "W. D. Latshaw, Secretary, proper, and journalist of the Senate."

6th Q. What is the date of the day upon which the proceedings of the Senate were had immediately preceding the name of said W. D. Latshaw?

150

Ans. Thursday, February 19th, 1857.

7th Q. In answer to the 3d direct interrogatory you speak of an original journal kept by the Secretary of the Senate. Now is it not the fact that the journal you speak

of is nothing more than the minutes (so to speak,) of the proceedings of the Senate from day to day, and that said minutes were furnished from day to day during the session of the Senate to the contractor or copyist, for making a record of the proceedings of said Senate?

Ans. The journal that I speak of in said answer, was the journal which the Secretary of the Senate was required to keep. I am certain that at that session no part of the journal was deposited in the secretary's office until after the adjournment of the legislature.

8th Q. Look upon the paper marked "Exhibit A," attached to your deposition in this case, and state whether the roll call of the Senate of the 20th General Assembly, was in that form. If yea, state how a vote was taken upon a call of such roll; how the same was entered by the Secretary of the Senate upon the minutes or journal, as kept by said Secretary; how those voting in the affirmative were noted upon said roll, and with what, whether with pencil or ink, and how those voted in the negative were noted and with what, and in what manner so noted. And state also if any different form was used to express a vote when the
151 record of the proceedings of said Senate came to be written up in the volumes now before you?

Ans. The blank paper before me, marked "Exhibit A," is the same in form as that used by the Secretary of the Senate at the session of 1857. It contains an alphabetical list of Senators, commonly called the yea and nay list. In calling the names of Senators upon any question before the Senate, those voting yea, or in the affirmative, were set down in one column, and those voting nay, or in the negative, in the other. The addition would show the vote upon the question. In that way it was inserted in the journal kept by the secretary, as a part of its proceedings, immediately after the vote was taken. At that session, it is my impression that the vote was sometimes entered with ink and sometimes by pencil. In the volume before me the vote upon any question is recorded by ayes and nays in the aggregate and not in alphabetical order, as in "Exhibit A" the names of Senators voting in the affirmative, appear in the journal on that side of the question, and those in the negative appear upon the other side of the question.

9th Q. You state, in answer to a direct interrogatory, that certain blanks were used by the Secretary of the Sen-

ate, in keeping the minutes or journal of said Senate? Will you please state what blanks, if any, beside the roll hereto attached, and state fully why blanks were
152 used?

Ans. It is my impression that other blanks were used. Blanks were for the convenience of the officers of the Senate, mainly to expedite the business before the Senate.

10th Q. Do you find any blank forms of any kind in the volumes or journal before referred to and now before you?

Ans. I do not. There is no printed matter in the journals before me.

11th Q. In answer to a direct interrogatory you state in substance that you know how the original journals or minutes of the Senate were kept at the time you were Secretary of State. Will you please state what disposition was made of motions, amendments, and resolutions, when offered in said Senate in writing?—whether the same were copied into said minutes or journals, or whether the same were pasted or fastened into said minutes or journals?

Ans. Sometimes they were written out and sometimes pasted into the journals themselves.

12th Q. Was the journal of the Senate, or the minutes kept by the journalist or Secretary of the Senate
153 of proceedings of said Senate for the session of 1857, as they came from the hands of said Secretary or journalist, in suitable condition for their preservation and understanding as the records of the proceedings of said Senate?

Ans. The journals, as deposited in the Secretary's office, from the Senate, at that session, were in suitable condition to be preserved, and could have been preserved, in the Secretary's office had they not been sent to the public printer; and could have been understood by any person at all familiar with legislative proceedings.

13th Q. Did you, when Secretary of State, when required to make a certificate of the record of proceedings of the Senate or House of Representatives, make such certificate from the original minutes or journal or from the bound volumes in your office?

Ans. When I was requested to make a certificate in relation to any fact or matter contained in a journal of either House, at any session, or to give a copy of any part of a journal, I gave it from a printed copy, as found in the Sec-

retary's office, and not from the original, as deposited by the officers of the Legislature in said office, at the close of the session.

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14th Q. Why did you give such certificate from the printed journal, as stated by you in answer to the last above cross-interrogatory, in preference to giving such certificate from the volumes before mentioned and now before you?

Ans. The printed journals are generally indexed. The journals before me are not indexed, and it would be very difficult to find a matter or fact in these journals.

O. M. HATCH.

Subscribed and sworn to before me, this 22d day of April, A. D. 1873.

[NOTARIAL SEAL.] THOS. C. JEWELL,
*Notary Public.*

I, Thomas C. Jewell, of the County of Sangamon and State of Illinois, a notary public in and for said County, in the State aforesaid, duly commissioned and authorized to take the depositions of the said Edward Rummel, George H. Harlow, J. N. Reece, James H. Paddock, Daniel Shepard, and O. M. Hatch, witnesses, whose names are subscribed to the foregoing depositions, do hereby certify that, previous to the commencement of the examinations of the said Edward Rummel, George H. Harlow, J. N. Reece, James H. Paddock, Daniel Shepard, and O. M. Hatch, as witnesses in said suit between the said Jeremiah

155 Goodwin, Anton Loser, Adam Oxenslager, George Daily, Erasmus D. Bradley, William A. Tanner, and William A. Tanner and Henry Tanner (partners by the name and style of Tanner & Son), Robert Johnson, Calcott Stowell, Josiah D. Dunning, George Hodden, Loren Gillett, B. Street, Cornelius Furman, William W. Bishop, and Horace N. Goodrich, complainants, and Martin B. Miller, defendant, they were duly sworn by me to testify the truth in relation to the matters in controversy between the said Jeremiah Goodwin, Anton Loser, Adam Oxenslager, Geo. Daily, Erasmus D. Bradley, Wm. A. Tanner, William A. Tanner and Henry Tanner (partners of the name and style of Tanner & Son), Robert Johnson, Calcott Stowell, Josiah

D. Dunning, George Hodden, Loren Gillett, B. Street, Cornelius Furman, Wm. W. Bishop, and Horace N. Goodrich, complainants, and the said Martin B. Miller, defendant, so far as they should be interrogated concerning the same; that the said depositions were taken by me in the office of the Secretary of State, in the city of Springfield, in the county of Sangamon, in the State of Illinois—all of the said depositions, except that of O. M. Hatch, having been taken on Wednesday, the ninth day of April, A. D. 1873; and the said deposition of the said O. M. Hatch having been taken on Monday, the twenty-second, and Tuesday,
156 the twenty-third, day of April, A. D. 1873; and that after said depositions were taken by me, as aforesaid, the interrogatories and answers thereto, as written down, were read over to the said witnesses, respectively; and that thereupon the same were signed and sworn to by the said deponents before me, to wit: Edward Rummel, George H. Harlow, J. N. Reece, James H. Paddock, Daniel Shepard, and O. M. Hatch—the oath being administered by me at the place and on the days and year last aforesaid.

In witness whereof, I hereto sign my name and affix my official seal, this ninth day of April, A. D. 1873.

[NOTARIAL SEAL.] THOMAS C. JEWELL,
*Notary Public.*

EXHIBIT A.

157

SENATE BLANK No. 1. ROLL.

Those voting in the affirmative are

Those voting in the negative are

| | Yeas. | Nays. | | Yeas. | Nays. |
|---|---|---|---|---|---|
| Archer | | | Lee | | |
| Baldwin | | | McGrath | | |
| Brooks | | | Murphy | | |
| Brown | | | Nicholson | | |
| Burke | | | Palmer | | |
| Burns | | | Patterson | | |
| Canfield | | | Reynolds | | |
| Casey | | | Sanford | | |
| Castle | | | Sheldon | | |
| Crews | | | Shepard | | |
| Cummings | | | Short | | |
| Cunningham | | | Starne | | |
| Cusey | | | Steele | | |
| Donahue | | | Strong | | |
| Dow | | | Thompson | | |
| Early | | | Upton | | |
| Ferrell | | | Voris | | |
| Glenn | | | Waite | | |
| Grenn | | | Ware | | |
| Gundlach | | | Warren | | |
| Hampton | | | Whiting | | |
| Henry | | | Wilcox | | |
| Hinchcliffe | | | Williamson | | |
| Hindley | | | Yager | | |
| Jacobs | | | Youngblood | | |
| Kehoe | | | Yeas | | |
| | | | Nays | | |

NOTARIAL SEAL, SANGAMON CO., ILLINOIS.

158 Deposition of William D. Latshaw, of the county of Edgar, and State of Illinois, as a witness, of lawful age, produced, sworn and examined, on his oath, on the twenty-third day of April, in the year of our Lord one thousand eight hundred and seventy-three, at the office of the Secretary of State, in the city of Springfield, county of Sangamon, and State of Illinois, by me, Thomas C. Jewell, a notary public, in and for the county of Sangamon, in the State aforesaid, notice to complainants' solicitors having been waived, as appears from the stipulation hereto attached, authorizing me, as notary public, to take the deposition of the said William D. Latshaw, a witness in a certain suit and matter in controversy, now pending and undetermined in the Circuit Court of the county of Kane, in the State of Illinois, wherein Jeremiah Goodwin, Anton Lozer, Adam Oxenslager, George Daily, Erasmus D. Bradley, William A. Tanner, Wm. A. Tanner & Henry Tanner, (partners by the name and style of Tanner & Son,) Robert Johnson, Calcott Stowell, Josiah D. Dunning, George Hadden, Loren Gillett, B. Street, Cornelius Furman, William W. Bishop and Horace N. Goodrich are complainants, and Martin B. Miller is defendant, as well upon interrogatories of the defendant, as upon the cross-interrogatories of the complainants, the said William D. Latshaw, being first duly sworn by me as a witness in the said cause, previous to the commencement of his examination, to testify to the truth
159 as well on the part of the complainants as of the defendant, in relation to the matters in controversy between the complainants and the defendant, so far as he should be interrogated, testified and deposed as follows:

*William D. Latshaw*—Sworn.

First Q. What is your name, age, residence and occupation?

Ans. William D. Latshaw; Paris, Edgar Co., Ills.; over 60 years; editor.

Second Q. If you had any official connection with the making of the journal of the Senate of the State of Illinois, of the session of 1857, you may state what it was?

Ans. I was, for a portion of the session, assistant secretary of the Senate, from the time the Senate organized, until February 10th; on the 12th of February, 1857, I was

appointed journalist, and from that date, until the close of the session, I wrote the journals.

3d Q. State fully what your duties were as such journalist.

Ans. To write the proceedings from day to day, so as to be read the next morning in the Senate.

4th Q. State fully the method pursued by you
160 in making said journal.

Ans. The journal was written on large cap or bill paper.

5th Q. State in what shape the said journal, as it was read from day to day, in the regular order of business, was, whether all written or partly written and partly printed, or in any other shape. State fully.

Ans. It was all written, excepting the ayes and noes, to my recollection. I have no recollection of putting in any other printed matter.

6th Q. State what was done with the journal by you at the close of the session, if anything.

Ans. During the session the printer applied either to Bond, or to the Secretary of State—perhaps, in some instances, to myself—for copies of the journal, for the purpose of putting it into type. The printer got the original copies in all cases, so far as my knowledge extends. When I say "journals," I mean the separate day's proceedings.

7th Q. State what became of these journals after they went into the hands of the printer.

Ans. I don't know.

8th Q. Did any person besides you have anything to do with the making up of the Senate journal after
161 February 12, 1857?

Ans. I recollect of no one. I was responsible for the correctness of journal.

9th Q. Look on the books now shown you, one being marked "Senate Journal, 1857," the other "Senate Journal, 1857 and 1859," and state whether said books, or either of them, or any part of either of them, is the original journal of the Senate of the State of Illinois for the session of 1857.

Ans. They are not the original. They may be copies.

10th Q. Do you know in whose handwriting they are?

Ans. I do not.

11th Q. I understand you to say that the journals of each day's session were from time to time, beginning before the close of the session, sent to the printer, and that you have no knowledge of them after the time they were so given to the printer. Is my understanding correct or otherwise?

Ans. That is my understanding, and I believe it to be correct.

12th Q. Please state a little more fully, if you are able, the method in which said journals were kept by you from day to day, and what was done with the records composing said journal on each day, if anything.

162 Ans. The first thing in the morning after the opening of the session was to commence my minutes for the order of business, numbering each motion, bill, resolution, or other matter, in an abbreviated form, as presented by members. As soon as the press of business ceased, I commenced writing journal, numbering each page consecutively, and when journal of each day was completed, it was fastened together with tape, and the ends of the tape fastened with sealing wax—the roll-call being inserted and fastened in instead of being copied in full.

13th Q. State whether or not these records so made by you would have formed, if they had all been retained and kept together in the office of the Secretary of State, a clear, intelligible, and correct record of the proceedings of the Senate during the time that you were its journalist.

Ans. Save an occasional omission of a word, I believe they would have made a correct record.

*Cross Examination.*

1st Q. In answer to an interrogatory, you state, in substance, that the public printer applied to Bond, the Secretary of State, or to you for the original journals of the Senate, and that said printer got the said journals.

Will you swear positively, and of your own knowledge, that said printer, or any one for him, got said journal or journals, or any or either of them, at the time and

163 in the manner testified to by you? State fully and particularly.

Ans. No. I believe that they got them and had them in their office and done the work. I cannot tell whether they got them through Hatch, or Bond, or myself.

2d Q. How long did you remain in Springfield after the 19th day of February, 1857, or about how long?

Ans. To the best of my recollection, I left the day the legislature adjourned, or the succeeding day.

3d Q. Will you swear, positively, and of your own knowledge, that the original journals were given to the public printer before they were placed in the hands of the copyist of the laws and journals of the General Assembly for the year 1857?

Ans. No. (Question objected to.)

4th Q. Will you swear, positively, of your own knowledge, that the public printer ever had said journals or any or either of them?

Ans. No; and yet I believe he had them.

5th Q. Do you know any thing of said journals, positively, after you signed them, and if you so signed them, please state in what name you signed them, and in what official capacity, if any?

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Ans. I know nothing, positively, of said journals after I signed them. I think I signed them; I do not recollect.

6th Q. Look at the paper marked "Exhibit A," attached to the deposition of O. M. Hatch, and state whether the roll call of the Senate of the 20th General Assembly was in that form. If yea, state how a vote was taken upon a question before the Senate upon a call of the roll, and how those voting in the affirmative were noted and how those voting in negative were noted, and whether the Secretary used ink or pencil in taking a vote?

Ans. The paper shown me is similar to those used in the 20th General Assembly. I do not recollect, but most generally it was done with pen and ink; those voting aye on the "yea" side and those voting no, on the "no" side.

7th Q. Is it not a fact that the journals kept by you are nothing more than the minutes of the proceedings of the Senate, from day to day; and were not said minutes placed from day to day during that session of the general assembly, in the hands of the Secretary of State for the use of the copyist of the laws and journals by him to be made

into a record such as the books before shown you, and of which you have heretofore testified?

165

Ans. If it had been a baptist association, I presume they would be called minutes, but being a legislative body, they are legally and technically the journals. They were not placed in the hands of the Secretary of State from day to day. I had frequently three or four on hand at a time.

8th Q. Have you ever been clerk or secretary, or *Secretary proper and Journalist* of a baptist association?

Ans. Never.

*Redirect Examination:*

14th Q. You may state what reasons you have for believing that the daily portions of said original Senate journal went into the hands of the public printer?

Ans. The reason was that the law required the work to be done as early as possible. I have always understood it to be so. I understood the law to require it. They were not delivered to the printer daily.

15th Q. State whether or not you ever saw any of said portions of said journal in the hands of said printer, or in the hands of any printers, in his employ, or in the office of said printer?

Ans. The employees of the public printer frequently were at my desk with portions of the journal for explanations.

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16th Q. Why did they come to you for explanation?

Ans. To get matter interpreted where they could not make out what it meant.

17th Q. State whether or not they were at those times engaged in printing said portions of the said journal?

Ans. So far as my own knowledge is concerned, I believe they were.

18th Q. State whether or not said portions of said journal thus brought to you for interpretation, were in your own handwriting?

Ans. After I was appointed journalist of the Senate I

believe they were, with few exceptions, all in my hand writing.

19th Q. State, if you know positively, whether or not, the original journals made by you were ever in the hands of copyists?

Ans. I have no distinct knowledge of it, but [but] yet I believe they were.

*Cross-Examination Resumed.*

9th Q. In answer to the 15th direct-interrogatory, you state in substance that some of the employees of the public printer frequently were at your desk with portions
167 of the journal of the Senate for explanation. Please tell us the name or names of such employees, and state also of what portions of said journal explanations were asked?

Ans. I cannot give the names; I could not tell what portions of the journal; they wanted explanations of various portions.

10th Q. Will you swear positively of a single time or place when any employee or printer from the public printing office came to your desk, or any other place, with any journal or any portion thereof for explanation?

Ans. They have applied frequently, and only at the Senate desk, to the best of my recollection.

11th Q. In answer to the fourth cross-interrogatory, you stated in substance that you would not swear positively that the public printer had said original journals, but that you believed they were in his hands. Have you had your recollection refreshed on that subject?

Ans. I will state now, as I did before, that, while I can't swear positively, yet I believe he had. I have not had my memory refreshed on it, any more than I have stated.

12th Q. Will you swear positively that any printer
168 or employee applied to your desk with the journals, or any portion of them, for correction or explanation?

Ans. To the best of my knowledge and belief, they did apply frequently.

13th Q. How many times did employees or printers, from the office of the public printer, call on you with the jour-

nals of the Senate, or any portion of them, during the session of 1857, for correction or explanation?

Ans. I cannot answer positively, certainly a dozen times.

WM. D. LATSHAW.

Subscribed and sworn to before me, this 23d day of April, 1873.

[NOTARIAL SEAL.] THOS. C. JEWELL,
*Notary Public.*

I, Thomas C. Jewell, of the county of Sangamon, and State of Illinois, a notary public in and for the county of Sangamon, in the State aforesaid, duly commissioned and authorized to take the deposition of the said William D. Latshaw, a witness, whose name is subscribed to the foregoing deposition, do hereby certify that, previous to the commencement of the examination of the said William D. Latshaw, as witness in said suit between the said Jeremiah Goodwin, Anton Lozer, Adam Oxenslager, George Daily, Erasmus D. Bradley, William A. Tanner, William A. Tanner & Henry Tanner, (partners by the name and style of Tanner & Son,) Robert Johnson, Calcott Stowell, Josiah D. Dunning, George Hadden, Loren Gillett, B. Street, Cornelius Furman, William W. Bishop and Horace N. Goodrich, complainants, and Martin B. Miller, defendant, he was duly sworn by me to testify the truth in relation to the
169 matters in controversy between the said Jeremiah Goodwin, Anton Loser, Adam Oxenslager, George Daily, Erasmus D. Bradley, William A. Tanner, Wm. A. Tanner and Henry Tanner, (partners by the name and style of Tanner & Son,) Robert Johnson, Calcott Stowell, Josiah D. Dunning, George Hadden, Loren Gillett, B. Street, Cornelius Furman, Wm. W. Bishop and Horace N. Goodrich, complainants, and the said Martin B. Miller, defendant, so far as he should be interrogated concerning the same. That the said deposition was taken by me in the office of the Secretary of State of Illinois, on Wednesday, the twenty-third day of April, A. D. 1873; and that after the said deposition was taken by me as aforesaid, the interrogatories and answers thereto, as written down, were read over to said witness, and that thereupon the same were signed and sworn by the said deponent, to wit, William D. Latshaw,

before me; the oath being administered by me at the place and on the day and year last aforesaid.

In witness whereof, I hereunto set my hand and affix my notarial seal, this twenty-third day of April, A. D. 1873.

[NOTARIAL SEAL.] THOS. C. JEWELL,
*Notary Public.*

STATE OF ILLINOIS, } ss. *In the Circuit Court.*
*Kane County.* } *To the May Term, A. D., 1873.*

JEREMIAH GOODWIN *et. al.*
*vs.*
MARTIN B. MILLER. } In Chancery.

170 It is hereby mutually stipulated and agreed by and between the parties to the said cause, that the deposition of William D. Latshaw may be taken before Thomas C. Jewell, a notary public in the City of Springfield, in said State, on behalf of said defendant, and that said deposition may be read at the hearing of said cause without objection, on account of the non-service of notice as provided by law by the defendant, upon the plaintiffs, such notice being hereby expressly waived by said plaintiff. It is also mutually agreed that the previous stipulations entered into in said cause, relating to objections to the competency and relevancy of the testimony therein, shall be applicable to the deposition of said Latshaw. It is also agreed that the stipulation dated April 9th, A. D., 1873, shall apply to the deposition of said Latshaw.

G. M. HALLENBACH,
*For Complts.*

EDWIN M. LEWIS,
*Sol. for Defendant.*

Which was all the evidence offered in the case, and the court makes this as a certificate of the evidence and orders the same to be filed as the evidence in the case.

S. WILCOX, [SEAL.]
*Judge.*

171 And afterwards, to wit: on the eighth day of May, 1873, the same being one of the days of the May Term, 1873, of said court, an appeal bond was filed in said court, in the words and figures following, to wit:

Know all men by these presents: That we, Martin B. Miller and Henry C. Paddock, as principals, and William H. Miller and Eugene B. Mix, as sureties, of the County of Kane and State of Illinois, are held and firmly bound unto Jeremiah Goodwin, Anton Lozer, Adam Oxenslager, Geo. Daily, Erasmus D. Bradley, William A. Tanner, Henry Tanner, Tanner & Son, Robert Johnson, Calcott Stowell, Josiah D. Dunning, George Hodden, Loren Gillett, B. Street, Cornelius Furman, William W. Bishop and Horace N. Goodrich, in the penal sum of three hundred dollars, for the payment of which well and truly to be made, we, and each of us, bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents.

Sealed with our seals, and dated at Geneva, Illinois, this sixth day of May, in the year of our Lord, one thousand eight hundred and seventy three.

The condition of the above obligation is such that whereas the said Jeremiah Goodwin, and the other above named obligees, did, on the 8th day of May, one thousand eight hundred and seventy-three, at a term of the Circuit Court, then being holden within and for the County of Kane and State of Illinois, obtain a decree against the above bounden Miller and Paddock, restraining them and either of them from collecting a certain tax specified in said decree
172 and costs of suit, from which decree the said Miller and Paddock have prayed for and obtained an appeal to the Supreme Court of said State. Now if the said Martin B. Miller and Henry C. Paddock shall duly prosecute said appeal, and shall, moreover, obey the said decree and pay the costs rendered, and to be rendered against them the said Miller and Paddock, in case the said decree shall be affirmed in the said Supreme Court, then the above obligation to be null and void, otherwise to remain in full force and virtue.

M. B. MILLER, [SEAL.]
HENRY C. PADDOCK, [L. S.]
WM. H. MILLER, [L. S.]
EUGENE B. MIX, [L. S.]

173 STATE OF ILLINOIS, } *ss.*
*Kane County.* }

I, Henry T. Rockwell, clerk of the Circuit Court, in and for said county, in State aforesaid, do hereby certify the foregoing to be a true, correct and complete copy of all papers on file and all proceedings had and entered of record in said court, in a cause recently therein pending on the chancery side thereof, wherein Jeremiah Goodwin *et. al.*, were complainants, and Martin B. Miller and Henry C. Paddock were defendants, except some affidavits not used in evidence.

{ SEAL of KANE COUNTY CIRCUIT COURT, ILL. } In witness whereof I have hereunto set my hand and affixed the seal of said Court, this 9th day of May, A. D. 1873.

H. T. ROCKWELL,
*Clerk.*

Fee for record, $45.

SUPREME COURT OF THE STATE OF ILLINOIS,

NORTHERN GRAND DIVISION.

To the September Term thereof, A. D. 1873.

MARTIN B. MILLER & HENRY PADDOCK,
*Appellants,*
174 *vs.*
JEREMIAH GOODWIN ET AL.,
*Appellees.*

And now come the said appellants, by E. N. Lewis, their attorney, and say, that in the record and proceedings aforesaid, and in the rendition of the decree aforesaid, there is manifest error, in this, to wit:

1. The court erred in rendering said decree in manner and form aforesaid, whereas said decree should have been rendered dismissing said bill of complaint for want of equity and want of proof to sustain it.

2. The court erred in making said injunction perpetual, in manner and form as in said decree is provided.

3. Said decree is contrary to the law and the evidence.

4. The court erred in admitting improper evi-
175 dence, offered by appellees in the court below.

5. The court erred in refusing to receive proper evidence, offered by the appellants in the court below.

6. The court erred in suppressing portions of the depositions taken on behalf of appellants in the court below.

7. The decree should have been for the appellants, and against said appellees, for costs.

E. N. LEWIS,
& B. F. PARKS,
*Appellants' Att'ys.*

And afterwards, to wit: on the eighteenth day of September, in the year of our Lord one thousand eight hundred and seventy-three—the same being one of the days of said Terms of said Supreme Court:

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| MARTIN B. MILLER & HENRY C. PADDOCK *vs.* JEREMIAH GOODWIN ET AL. | Appeal from Kane. |

And now, on this day, this cause is submitted by appellants, on briefs herein filed, and taken under advisement by the Court, on call of the docket.

And afterwards, to wit: on the thirtieth day of January, in the year of our Lord one thousand eight hundred and seventy-five—being in vacation after September Term, A. D. 1874, of said Supreme Court—the opinion of said Court was filed herein in the words and figures following, to wit:

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| MARTIN B. MILLER ET AL. *vs.* JEREMIAH GOODWIN ET AL. | Appeal from Kane. Opinion by SCHOLFIELD, J. Filed January 30, 1875. |

No. 70.

In *Ryan* vs. *Lynch* (June Term, 1873), we held, on the evidence then before us, that the purported act entitled "An act authorizing certain cities, counties, incorporated towns and townships to subscribe to the stock of certain railroads," approved February 18th, 1857 (Public Laws of 1857, p. 225), was not passed by the Senate in conformity with § 2, Art. 3, of the Constitution of 1848, and was therefore not a law. The evidence upon which we came to that

conclusion was a transcript of the Senate Journal, certified by the Secretary of State in proper form. The same evidence is before us in the present case—but there is also evidence introduced by appellants for the purpose of impeaching this transcript, now before us, and our first enquiry must be as to the effect of that evidence.

It is shown by the evidence that the minutes of the proceedings of the General Assembly of 1857 were taken down by the proper officers of the respective houses on sheets composed of blanks, prepared for conveniently taking the "ayes" and "noes," and "cap" paper—which were fastened together, at the end of each day's proceedings, and subsequently deposited with the Secretary of State. These the Secretary caused to be copied, in regular and proper order, in a bound volume, prepared and kept in his office for that purpose, which was called the "Journal Record." When the minutes were thus copied, they were sent to the public printer, and they were never returned. The transcript in evidence is of the Journal Record in the Secretary's office, and not of the original minutes prepared by the officers of the General Assembly. It is insisted that the transcript of the minutes alone is admissible as evidence. The provision in the Constitution of 1848 requiring each house to keep and publish a journal of its proceedings, is precisely the same as that of the Constitution of 1818. The constitutional mandate is simply that "each house shall keep a journal of its proceedings, and publish the same." The requirement that any evidence of such journal shall be kept in the office of the Secretary of State, as well as when and how evidence of the same, admissible in courts of justice, shall be obtained, is merely a statutory regulation.

It was provided by § 3, Chap. 84, Rev. Stats. of 1843, that the journal of each house of the General Assembly *shall be kept* in a well-bound book [*books*]; and by §§ 65 & 8, Chap. 96, of the same statutes, they were required to be deposited with the Secretary of State.

By § 3 of "An act to provide for copying and distributing the laws and journals, and for other purposes," in force February 12th, 1849 (Laws of 1849, 95), the Secretary of State is required, within thirty days previous to the meeting of any future General Assembly, to advertise for proposals for copying the laws, joint resolutions, and journal of the General Assembly. And by § 4 of the same act, he

is required to furnish a well-bound book in which the journals shall be copied. These sections are *in pari materia* with the preceding sections, referred to, of the Revised Statutes of 1845, and they must be construed together. It is obviously impracticable to record the proceedings of each house, as they transpire, in "well-bound volumes," as must have been well known to the members of the Legislature; yet the journal must thus be kept—and it is certainly impossible that the journals shall be copied in a well-bound book, unless there is something to copy from. Plainly, then, the current minutes taken by the clerks and secretaries, and their assistants, in the respective houses, were not understood to be "Journal Records," but minutes merely, as they were in fact, to be transcribed into such records; of necessity, the minutes could not be in a convenient and permanent form for preservation; and they were, therefore, required to be copied into a record in which they could be preserved. This view is greatly strengthened by the fact that there is no other possible motive, which we can conceive, requiring the journals to be copied into a bound record. Public information of the proceedings is required to be furnished by publication; and if this record is not designed to be a permanent depository of the evidence of the proceedings required to be copied into it, then we must presume that the law requires the making and preservation of a public record with no end in view. This is not admissible.

It is a sufficient answer to the objections urged that the officers of the general assembly have not signed the record, and that the copying clerks have not certified to the accuracy of their work; that these things are not required by law. It is presumed that the record made pursuant to law is accurate, until the contrary is successfully established. Deed records and records of the proceedings of courts contain no certificates, by the clerks by whom they are made, appended either at the close of the volumes or elsewhere. That they are accurately and truly made; and we have never yet heard that copies of them might not be read in evidence, in proper cases, on account of this omission. The guarantee of accuracy and fidelity in all such cases is found in the obligations of official duty.

We are of opinion, then, that the transcript in evidence

was of the proper record, and that it is conclusive against the validity of the pretended act of Feb'y 18th, 1857, before referred to.

In no other respect, than the one just noticed, does the present case materially differ from that of *Ryan* vs. *Lynch et al. supra;* and we deem it necessary to add but little to what we said in that case.

We there said: "The bill * * never became a law, and the pretended act conferred no power." * * * It follows that the bonds were not merely voidable, but that they were absolutely void, for want of power or authority to issue them; and consequently no subsequent act or recognition of their validity could so far give vitality to them as to estop the tax payers from denying their legality." To this we add the following quotation from Dillon on municipal corporations, § 381:

"The general principle of law is settled, beyond controversy, that the agents, officers or even city council, of a municipal corporation, *cannot bind the corporation* by any contract which is beyond the scope of its powers, or entirely foreign to the purposes of the corporation, or which (not being in terms authorized) is against public policy. This doctrine grows out of the nature of such institutions, and rests upon reasonable and solid ground. The inhabitants are the corporators—the officers are but the public agents of the corporation. Their duties and powers are prescribed by statute or charter, which all persons not only may know, but are bound to know. The opposite doctrine would be fraught with such danger and accompanied with such abuse that it would soon end in the ruin of municipalities, or be legislatively overthrown. The considerations vindicate both the reasonableness and necessity of the rule that the corporation is bound only when its agents or officers, by whom alone it can act, if it acts at all, keep within the limits of the chartered authority of the corporation." * * * It results from this doctrine that unauthorized contracts are void, and in actions thereon the corporation may successfully interpose the plea of *ultra vires*, setting up, as its defense, its own want of power, under its charter or constituent statute, to enter into the contract." See also §§ 749, 767 and notes.

The decree of the court below will be affirmed.

*Affirmed.*

And, to wit, on the same, the thirtieth, day of January, in the year of our Lord one thousand eight hundred and seventy-five, being in vacation after said September Term of said Supreme Court:

MARTIN B. MILLER, *Collector, &c., and* HENRY C. PADDOCK, *Treasurer, &c.*,
*vs.*
JEREMIAH GOODWIN, ANTON LOSER, ADAM OXENSCHLAGER, GEORGE DAILY ERASMUS D. BRADLEY, WILLIAM A. TANNER, HENRY TANNER, TANNER & SON, ROBERT JOHNSON, CALCOTT STOWELL, J. D. DUNNING, GEO. HADDEN, LOREN GILLETT, B. STREET, C. FURMAN, W. W. BISHOP AND H. N. GOODRICH. } *Appeal from Kane.*

On this day came again the said parties, and the court having diligently examined and inspected, as well the record and proceedings aforesaid, as the matters and things therein assigned for error, and being now sufficiently advised of and concerning the premises, for, that it appears to the court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious or defective, and that that record is no error; therefore, it is considered by the court that the judgment aforesaid be affirmed in all things, and stand in full force and effect, notwithstanding the said matters and things therein assigned for error; and it is further considered by the court that the said appellees recover of and from the said appellants their costs by them in this behalf expended, and that they have execution therefor.

I, Cairo D. Trimble, Clerk of the Supreme Court in and for the Northern Grand Division of the State of Illinois, do hereby certify that the foregoing is a true copy of the final Record and Proceedings of the said Supreme Court in the above-entitled cause, of record in my office.

In testimony whereof, I have set my hand and affixed the seal of the said Supreme Court, at Ottawa, this 14th day of December, in the year of our Lord one thousand eight hundred and seventy-six.

{ SEAL OF THE SUPREME COURT. }

C. D. TRIMBLE,
*Clerk of the Supreme Court.*